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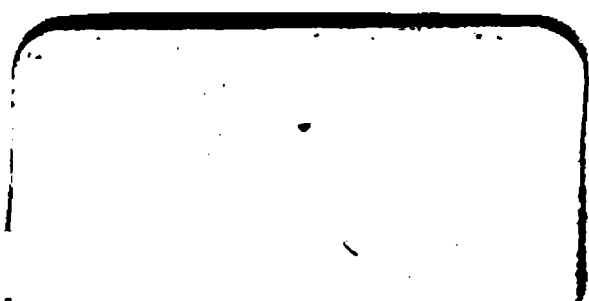
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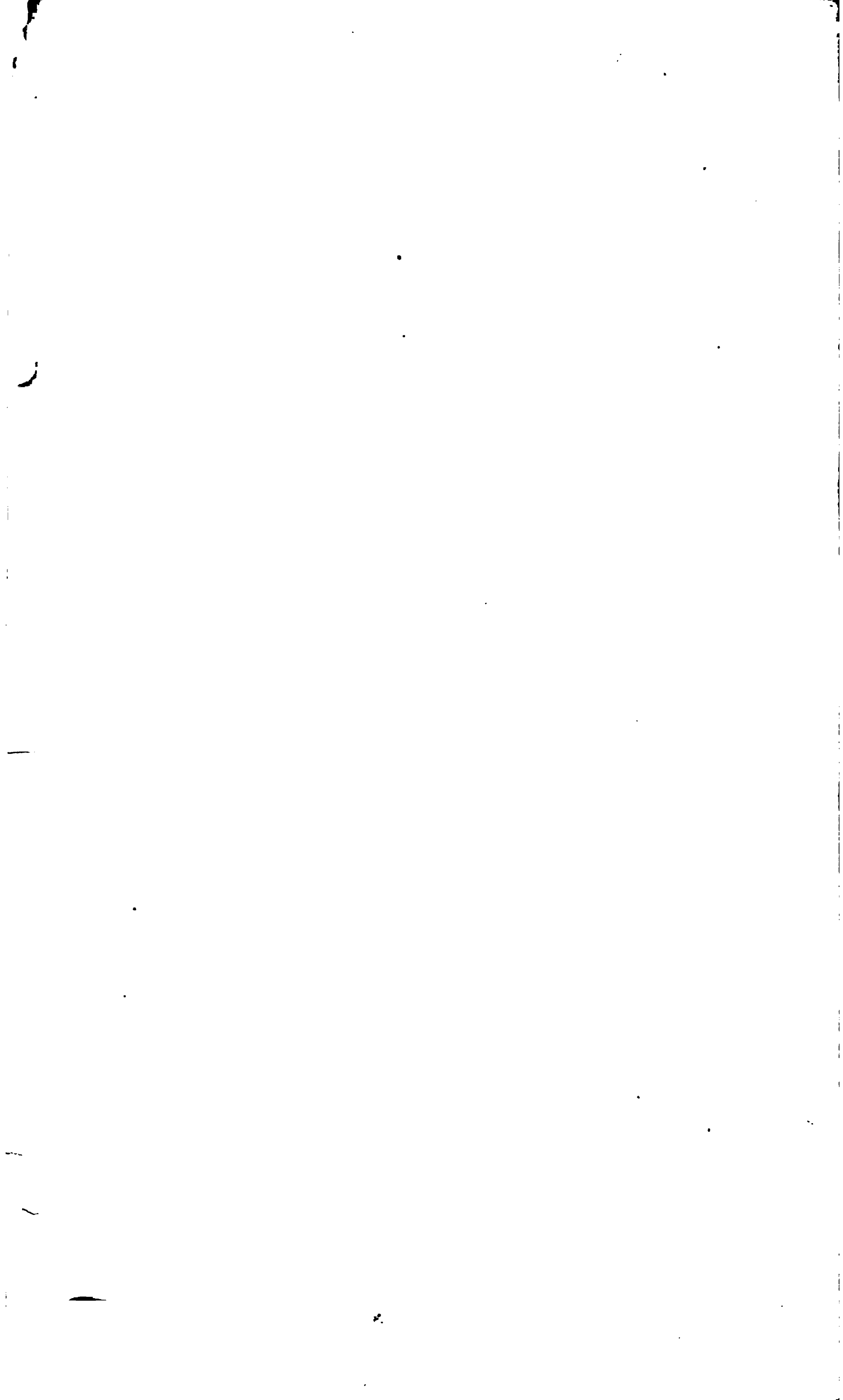
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A
TREATISE
ON THE
Law of Mortgages,

BY THE LATE
J. J.
J. J. POWELL, Esq.

THE SIXTH EDITION,
MUCH ENLARGED AND IMPROVED,
WITH COPIOUS NOTES,
By THOMAS COVENTRY, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. I.

SAMUEL BROOKE, PATER-NOSTER ROW,
LONDON.

1826.

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TO
JOHN BARFIELD, Esq.
OF THATCHAM, BERKS.

DEAR SIR,

IT affords me much pleasure to present you with some fruit of those habits of application, which your fostering care and example formed in my mind during the five years I had the happiness of residing in your family, and receiving the advantage of your kind advice and instruction.

The value of your good opinion I shall ever esteem; and with unfeigned affection and gratitude beg to dedicate this Edition of the following Treatise to you, in testimony of the unsullied integrity which has characterised your long and prosperous professional career, and of the acknowledged benevolence and philanthropy which stand pre-eminent among the many virtues of your private life.

I remain,

My Dear SIR,

Your faithful Friend, and

Obedient Servant,

The EDITOR.

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TO

THE SIXTH EDITION.

NUMEROUS Additions and Corrections have been made in the present Edition; in particular, the latest Cases have been introduced throughout the Work. A third Volume, containing a great variety of MORTGAGE PRECEDENTS adapted to the present day, will be very shortly published, and may be purchased separately, by Gentlemen already possessing former Editions of this Work.

The paging in this Sixth Edition is made conformable to the Fifth. But in consequence of the Additions, it will be observed, that the letters *a*, *b*, *c*, &c. have been added where the folio has contained a portion of matter exceeding the usual length of a page.

A Table of Parallel Reference is added to this Edition, in order to shew where the subject-matter of the Fourth Edition will be found in the Fifth and Sixth.

Trinity Term, 1826.

PREFACE

TO

THE FIFTH EDITION.

THE SUBJECT of the ensuing Treatise is one of very general interest. It embraces an extensive variety of particulars relative to the negotiation of a large portion of human affairs. Every possessor of property is more or less connected with some Mortgage transaction—either personally, or by those through whom his title is derived. A knowledge therefore of the operation and effect of a Mortgage security must be very desirable to all who stand in the relation of lender and borrower, and especially to those from whom a ready and intimate acquaintance with the subject is professionally required. To assist in communicating accurate and useful information on this branch of legal learning, was the original design of the present undertaking; and the Editor hopes, that in the ample field of annotation into which he has been imperceptibly led, he has not lost sight of the grand object to

which the learned Author's laborious and successful exertions have been so eminently directed.

By the Preface to the First Edition it appears that the Author at one time proposed to himself a more confined method of treating his subject; but recollecting the frequent embarrassments he had himself experienced in his studies, from books written as if intended more for the perusal of adepts in science, than for the instruction of the unlearned, he thought it most conformable to his original design, which was to smooth the way for others; to sacrifice conciseness, to perspicuity and accuracy—preferring the imputation of being prolix and tedious, to that of being obscure and perplexing.

In this, the Editor has followed his Author, because it was his wish to fall in as nearly as possible with the spirit and genius of the original plan; and because, in so important a particular as the Law, where great stakes both of property and character are depending, nothing can be more injurious than a flippant or ambiguous consideration of the subject.

Law text books are variously composed. Some merely select the heads of law, and refer to the report for the reasons and authority of each position. Some adopt a more didactic plan, and illustrate, by comparisons and examples, the abstruser doctrines of the subject on which they treat; while others correct and methodise the au-

thorities, epitomise the cases, and preface each paragraph with an elementary principle, followed up with an abridgment of the adjudication whereon it is founded. Mr. Powell's Treatise on the Law of Mortgages is a book of this latter class: and if the annotations (which profess to be a continuation of the original work, rather than an assemblage of short notes on questionable points) had exhibited a different mode of compilation, a singular discrepancy would have been observable; engendering indeed a just suspicion that the Editor had not duly appreciated the intent of his Author's undertaking.

To the Student this work was originally addressed; but the subsequent editions have rendered it pre-eminently useful to the practical Lawyer, in discovering to him parallel cases, and in furnishing him with a systematic body of law on a subject of very frequent recurrence. In short, the high reputation of the original Work renders it an indispensable part of every Lawyer's Library. It was the scarcity of so valuable a Treatise, that induced the Editor to undertake the task of preparing a new edition for the press; and he conceived that by adding the subsequent decisions and other practical information, he should be forwarding the design of the learned Author. The Editor's object has been to make the present edition of Mr. Powell's Work a comprehensive digest of the theory and practice of Conveyancing, with reference to Mortgage securities.

But to state more particularly what has been done on the occasion of this re-publication,

1st. The paging of the fourth edition has been preserved, and uniformly referred to, except where the contrary has been expressly noticed. In the Analytical table of Contents, as also in the table of Cases, and in the Index, the figures refers to the paging of the fifth Edition.

2dly. Marginal reductions of the principal points of each paragraph have been added throughout. The aim in this has been to detect the principle or general rule; and the Editor places much confidence in this part of his undertaking, as he feels persuaded it will materially assist research, and greatly facilitate the general comprehension of the Work.

3dly. The cases cited by the learned Author have been examined, and all other cases bearing on the subject, as well prior as subsequent, which a diligent research could discover, have been added in the notes. The produce, however, actually exhibited, bears a small proportion to the number rejected, and which the anxiety of collecting all the authorities made it necessary to review. References also have been made to text writers; and questionable doctrines have been stated and examined with a desire rather to reconcile, than to increase doubts.

4thly. A new table of Cases, cited in the text and notes (which amount to several thousand),* and

* Greatly augmented in this Sixth Edition.

Analytical tables of Contents to both volumes have been prefixed.

5thly. An Appendix of Precedents* has been annexed, containing a great variety of forms, arranged on an entirely new plan. The first number consists of forms in constant use, to which the subsequent drafts refer. One object in this arrangement has been to save the repetition of the usual set of mortgage recitals, provisoes, and covenants, which, if inserted in the thirty succeeding numbers, would have swollen the Appendix to an unwieldy and expensive length. The convenience of having these common forms in a separate shape is too obvious to require comment.

6thly. A new and copious Index is subjoined, as well to the principal matters as to the Appendix, and

7thly. It may not be amiss to mention, that several of the notes contain almost complete treatises on various subjects connected with Mortgage transactions. Among these, the notes on Receivers, Attendant Terms, Judgments, and the Statute of Limitations, are conspicuous.

In taking leave of an old and instructive Companion, the Editor is affected with emotions of the liveliest gratitude for the extensive advantages he has derived from a preparation of the ensuing sheets

* Forming a separate Volume in this Sixth Edition.

for the press ; and he sincerely hopes that the labours of the Learned Author will not be unaided by his humble annotations, in communicating useful information to others.—For a generous extenuation of the numerous errors and imperfections which a learned and experienced eye will easily discover, the Editor trusts to that candour and liberality with which the criticisms of the Profession are ever accompanied.

In conclusion, the Editor desires to express his thankfulness to his friend REVELL PHILIPS, Esq. of the Middle Temple, for the kind assistance he has afforded him during the progress of the Work.

*5, Old Square, Lincoln's-Inn,
6th Sept. 1822.*

A
TABLE
OF
PARALLEL REFERENCES,

*Connecting the paging of the FOURTH EDITION with the FIFTH
and SIXTH EDITIONS of this Work.*

THE Fourth Edition of this Work was published in 1799. On the publication of the Fifth Edition in 1822, it was considered advisable to preserve the paging of the Fourth Edition, in order that the numerous references to the Work in the interval might not become entirely useless. That paging was accordingly preserved in the margin of the Fifth Edition, but from the bulk of new matter introduced into this Sixth Edition it was found inconvenient to continue it, and at the same time to retain the paging of the Fifth Edition, to which the Index and Table of Cases referred. The preservation of the paging of the Fourth Edition being still considered of some importance, the following parallel Table has been compiled, which will assist in shewing where a reference to the Fourth Edition may be found in the Fifth and Sixth Editions. This Table necessarily refers to the Text only.

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A

Treatise on Mortgages.

CHAP. I.

OF THE ORIGIN AND NATURE OF MORTGAGES.

THE notions of mortgaging and redemption are, by some, ^{Origin of mort-} thought to have originated with the Jews (*a*), one great object ^{gages.} of whose law, was the constitution of a just and equal *agrarian*, with a view to keep their lands in the same tribes and families. For this purpose they appointed a certain period, at which, whatever alienations might have taken place in the mean time, all landed property should revert to its original owner. The time of this general restoration of property was called the Jubilee, and occurred once in fifty years; therefore, if any were compelled, by necessity, to part with their lands in the mean time, they could transfer no interest therein, or incumber them farther, than to the next general jubilee: with a view to that, therefore, they made their computations, and, according to the distance from thence, was the extent of interest, in land, that could be transferred to a buyer; but the vendor, by their law, had power at any time to redeem, repaying the value of the lands from the time of redemption to the jubilee, and if they were not repurchased before the year of jubilee, then the lands, of course, reverted, released from the debt, to the vendor, and his heirs.

(*a*) *Canons*, pages 11, 12, 13, 14. 130. 131; and *Bac. Abr.* title *Mort-*
2 *Ancient Universal History*, pages *gage*.

Origin of mortgages.

But mortgaging, as practised with us, seems to owe its introduction more immediately to the Roman law, which distinguishes between things pledged or hypothecated, and things mortgaged.

In the following passage, we have the description of an English mortgage of lands in the Roman law: "*Si fundum parentes tui ea lege vendiderunt, ut sive ipsi, sive hæredes eorum emptori pretium quandocunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictæ, hæres emptori non paret, ut contractus fides servetur actio præscriptis verbis, vel ex vendito tibi dabita: habitur ratione eorum, quæ post oblatam ex pacto quantitatem ex eo fundo adversarium pervenerunt.*" (b)

And the following description is equally applicable to a mortgage of moveables: "*Si à te comparavit is, cujus meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat, ut jure domini eandem rem retineat: Denunciationis et obsignationis depositionisque remedio contra fraudem potes jure tuo consulere.*" (c) (A)

(b) Just. Cod. l. 4. t. 54. s. 2.

(c) Cod. l. 4. t. 54. s. 7.

Origin of mortgages.

(A) From the Jews the notion of mortgaging is said to have been derived to the Greeks and Romans, and the text justly supposes us to have borrowed it from the civil law. Mr. Butler however observes, that it appears from Lit. sect. 332, that mortgages were introduced less upon the model of the Roman *pignus* or *hypotheca*, than upon the common law of conditions, an observation which Mr. Fonblanque truly says, cannot at least apply to the equity of redemption.

In a state of nature, agreements of this kind must have been entirely useless; for, in that state, a creditor might have seised on any part of his debtor's goods, without ceremony or contract. Puff. lib. 5. c. 10. s. 16. But when society became compacted and consolidated, there immediately arose a right to every man to enjoy his own, and the support and vindication of that right was one grand object of every civilized community.

Among subjects of the same state, it must soon have suggested itself, that no easier mode of supplying their immediate wants could have been adopted, than by resorting to a system of borrowing on loan. They must frequently have been in need of temporary accommodation, and the plan of assisting each other on credit would have exhibited the readiest method of giving relief

The striking distinction (*d*) between a mortgage of lands or goods, and a pawn of goods, is, that in the former case, the mortgagee has, after the condition forfeited, an absolute interest in the thing mortgaged, whereas the pawnee has but a special property in the goods, to detain them for his security. A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to

*Mortgage and
pledge distin-
guished.*

(*d*) Noy, 137. Cro. Jac. 245. 2 Vea. jun. 378.

to their present necessities. In cases of magnitude, they would have required a pledge or security for the return of the thing borrowed; and the immediate resignation of some transportable article was the consequence of a compliance with that request.

Hence it should appear that the primitive idea of mortgaging ought to be referred more to the introduction of order and civilization among mankind, than to the invention of any particular set of people; for, to the tranquillity of every commonwealth (depending as it does so greatly on mutual assistance), it is absolutely requisite that recourse should be had, even in its infancy, to this system of lending on security. It is evident, that different nations would subject it to different regulations, and in England the Court of Chancery has given rise to the inseparable incidents of redemption and foreclosure. But the general principle must have been common to all mankind, as a necessary effect of the establishment of society.

The practice, then, of lending and borrowing at interest must have existed from the earliest antiquity; but its present prevalence, which is almost universal, may be attributed to the extension of commerce: for commerce could not be carried on without credit, and credit could not be obtained without compensation.

It has been said that there were not any mortgages of lands with us while the feudal tenures were on foot. Trea. on Eq. lib. 3. c. 1. s. 1. Although it might have been a rule in the feudal law, that, *feudalia, invito domino, aut agnatis, non recte subiciuntur hypothecæ*; yet it appears from Craig, that with the concurrence of the lord, the tenant might have aliened, and consequently have mortgaged his lands. Feud. lib. 2. tit. 5. s. 5. And in the reign of Hen. 2, the two modes of pledging lands, mentioned in p. 4, post, were in use, and are fully described by Glanville. They appear to have been adopted from the customary law of Normandy, Grand. Cust. lib. 10. c. 8. s. 20, *et vide* Vinous, in Inst. lib. 3. tit. 15. And the feudal lord it seems, might at all times have mortgaged his lands. As an instance of this, William, Earl of Poitiers, mortgaged the provinces of Guienne and Poitou to William Rufus, King of England. 1 Hume's Hist. of Eng. 270. 4 Ib. 80.

In Athens, if the landed proprietor borrowed any money on his lands, he had to set up an inscription declaring the extent of the mortgage; and it seems, that in Attica there were no entailed estates to prevent the repayment of debts to incautious creditors. Campb. Lec. Post.

be taken back but on payment of a certain sum, by express stipulation, or the course of trade to be a lien upon them.

As a feud, licence to mortgage necessary.

It being a fixed rule in the feudal law, that, *feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est* (e); the feudatory could not obtrude a tenant on the lord without his leave, such tenant being the person on whom the lord depended for his personal service in war and peace: and, as the tenant could not alien without licence, so neither could he mortgage without licence.

But, when a licence was given for alienation about the time of Hen. 3. (f), and it became a maxim in law, *that the purity of a fee-simple, imported the power of disposing of it as the owner pleased*, there were two ways of mortgaging lands introduced, which Littleton distinguishes by the names of *vadium vivum*, and *vadium mortuum*.

Vadium vivum. The *vadium vivum* was, where a man borrowed 100*l.* of another, and made over an estate of lands to him, until he had received that sum out of the issues and profits thereof; and was so called, because neither the money, nor the lands, were lost; for the latter were *constantly* paying off the former, and were not left as a dead pledge, in case the money was not paid (g).

[4]
Vadium mortuum.

The *vadium mortuum* (to which our attention hereafter will be particularly applied) was (h), where one man borrowed of another a specific sum of money, and granted him an estate, as a security for the repayment, on condition, that if the mortgagor repaid the mortgagee the sum lent, on a certain day mentioned in the deed, then, that the mortgagor might re-enter thereupon: and was so called by Littleton, because it was doubtful whether the feoffor would pay the money at the day limited, or not; and if he did not pay it, then the land, which was but in pledge upon condition, for the payment of the mo-

(e) Corvin Dig. 268.

(f) 9 Hen. 3. 32. 18 Ed. 1.

(g) Co. Lit. 206. [post, 418.—Ed.]

(h) Lit. sect. 332. Co. Lit. 205.

Terms de la ley, 448. 2 Bl. Com. 157, 158.

ney, was not to be restored to the owner, and therefore was considered as dead to *him* (i); and if he did pay it, then the pledge was to be restored to him, and, consequently the tenant of the land in pledge had no farther interest therein.

Of the last species of mortgages there are two kinds (k). First, mortgages of the freehold and inheritance; and, secondly, of terms for years.

The ancient way of making mortgages of the freehold and inheritance (l), was by a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the sum borrowed to the feoffee, or his heirs, at a day appointed, he should re-enter, and re-possess (B). Feoffment on condition.

Sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by a distinct instrument; for, as a man might annex a condition to his feoffment, the maxim being that, *cujus est dare, ejus est disponere*, so he might annex a condition thereto, by another deed, bearing date, and executed, at the same time; for being executed at the same time, it is *really* but one and the same disposition; but if the defeasance, or condition, was contained in a deed executed after the feoffment, it came too late (c); because livery of seisin, or corporal tradition (m), being necessary at

(i) Cragli Jus. Feud. 234, 235.

(m) Glanvil, l. 10. c. 8. 2 Bla.

(k) Madox, 318, 319.

Com. 160.

(l) Ibid.

(B) A modern mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a pledge and security for the re-payment of a sum of money borrowed; with a proviso, that such conveyance shall be void on payment of the money and interest on a certain day, and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law; yet the mortgagor has still an equity of redemption, that is, a right in equity on payment of the principal, interest, and costs, within a reasonable time, to call for a re-conveyance of the lands; *et vide infra*, 109. Modern mortgage described.

(C) As to the inconvenience of a defeasance in a separate deed, see *infra*, p. 8, n. (g); and for the note introduced here in the last edition, on Defeasances generally, see vol. iii. tit. Warrant of Attorney, to a precedent of which that note is now transferred.

common law, to all conveyances of land, no mortgage thereof was valid unless possession also was delivered to the mortgagee, and the livery, *coram paribus* in such case, attesting an infeudation, in which there was no condition, the tenant must hold the land according to that investiture.

Conditions in
nature of gift,
and debt, dis-
tinguished.

[6]

Again, a distinction (n) was taken at common law, where a man granted an estate to another by way of mortgage, for securing a sum of money at a day appointed, in the nature of a gratuity or gift; and, where a man was indebted to another in a certain sum, previous to the grant, and made a mortgage of his estate, in fee or otherwise, to secure the same to the mortgagee: for, in the former case, a tender of the money within the time, and by the person named in the condition, discharged the estate mortgaged from the condition, and gave to the mortgagor a right of entry: Because, there being no debt, independent of the condition, the money was considered, in law, as collateral to the land, that is, not parcel of it; and the mortgagor, having performed the condition as far as was in his power, and being prevented from completing it by the refusal of the mortgagee, was entitled to have his lands again; and, then, the mortgagee, having no farther lien thereon, or any *personal* action, was left without any remedy for his money: But, in the latter case, although, by tender of the money to the mortgagee, and his refusal, the mortgagor became entitled to enter into the land, freed for ever from the condition; yet the debt still remained, and might be recovered, by action of debt; for it was a *duty* distinct from the condition, and therefore, not lost by the tender and refusal.

Conditions,
creating and
destroying es-
tates, distin-
guished.

In the performance of conditions, a distinction (o) is made between those which are to create an estate, and those which are to destroy it; for the former may be performed, by construction of law, as near the condition as may be, and according to the intent and meaning thereof, though the letter and words cannot be complied with; but the latter are to be strictly construed, unless in special cases.

(n) Co. Lit. 207 a. 209 a. b. Lit. sect. 335. 338. 9 Co. 77. (o) Co. Lit. 219 b.

Conditions, annexed to estates, granted by way of mortgage (*p*), were considered to be of the former description; for although, by the performance of the condition, the estate was to be divested out of the mortgagee; yet it was with intent to re-instate the mortgagor in his inheritance.

Mortgage conditions create an estate.

However, these sorts of conveyances, by way of mortgage in fee (*q*), were at first found to be attended with great inconveniencies; as, if the money was not paid at the day, so that the condition was forfeited and the estate became absolute, the estate was thenceforth subject at common law to the dower of the wife of the feoffee, and to all his other real charges and incumbrances; for though, if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and consequently was in, above all charges and incumbrances of the feoffee; yet, if he did not *literally* perform the condition by payment of the money at the day, then the estate became *legally* subject to the charges and incumbrances of the feoffee, though the money should be afterwards paid, and the estate re-conveyed to the feoffor; for, till Henry the Eighth's time, the widow of a trustee held her dower, the husband his curtesy, the lord his escheat, and the king his forfeiture, free from the trust.

Mortgage in fee originally subject to dower and charges of mortgagee.

[7]

To avoid these inconveniencies (*r*), the second sort of mortgages were adopted, and it became usual to grant only a long term of years, by way of mortgage, with condition to be void, upon re-payment of the mortgage money: which course is now frequently used, principally because, on the death of the mortgagee, such term becomes vested in his personal representatives, who now are (as will be shewn) entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Mortgages for years.

But courts of equity (*s*), after their jurisdiction became firmly established, put mortgages in fee upon the right footing,

Mortgages in fee, now subject to redemption.

(*p*) Co. Lit. 205 a. 206 a. 213 a. Bac. Abr. 632. Vid. 1 Bl. Rep. 156.

221 b. 1 Co. 22. Sir T. Wyat's case, (r) 2 Bla. Com. 158.

Cro. Car. 427.

(s) Cro. Car. 191. Hard. 465. 469.

(q) Co. Lit. 221, 222. Hard. 463. [1 Eq. Ca. Ab. 311.—Ed.]

Cro. Car. 191. 1 Eq. Ca. Abr. 311. 5.

[8]

maintaining the power of redemption, as an equitable right inherent in the land, and binding all persons, whomsoever, whether claiming in the *per*, (*i. e.*) by the act of the mortgagee; as tenant in dower (D), by *statute Staple, Elegit, &c.*; or in the *post*, (*i. e.*) by the act of the law; as tenant by the curtesy (E), and lord by escheat: and the principle upon which they proceeded was, that the payment of the money does, in the consideration of equity, put the mortgagor *in statu quo*, since the lands were originally only a pledge for the money lent.

Mortgages in fee and for years compared.

And since this right or power of redemption has been so understood, mortgages in fee have again become usual; for although mortgages for terms of years were free from the inconveniences attending mortgages in fee, with respect to tenant by dower, curtesy, &c. yet they were not without objection, as in case of foreclosure on non-payment, the mortgagee became only a termor, the fee-simple remaining in the mortgagor (F).

Mortgages by demise, ancient and modern.

Mortgages, by way of creating terms, were formerly by way of demise and re-demise (*t*). Thus, if A. borrowed money of

(*t*) Bac. Abr. 633.

Wife of a mortgagee in fee entitled to dower.

(D) The wife of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower. Hard. 466. Co. Lit. 221 a. 205 a. Lit. a. 357. 221 a. 221 b. 2 Tho. Co. Lit. 76, 77, but if she were to prosecute her claim, a court of equity would undoubtedly interpose and saddle her with all the expences. *Nash v. Preston*, Cro. Car. 190. *Noel v. Jevon*, 2 Freem. 43. 71. Under this impression, a fine to bar the dower of a wife of a mortgagee in fee, is seldom, if ever, advised.

But husband not to curtesy.

(E) The husband of a mortgagee in fee, shall never be tenant by the curtesy of the mortgaged estate, unless there be a foreclosure, or unless such mortgage has subsisted for so great a length of time as the court thinks sufficient to induce them not to grant a redemption. Per Lord Hardwicke, in *Casborn v. English*, 7 Vin. Abr. 157. 2 Ves. jun. 433. The reason of this is, that in equity, a mortgage in fee is considered as personal estate, notwithstanding the estate at law vests in the heir of the mortgagee; and of personal estate, there can be no curtesy. This, however, is not very satisfactory, for the same reason would operate to exclude the wife of the mortgagee of dower, which we have seen it does not. The late case of *Morgan v. Morgan*, 5 Madd. 410, does not affect this doctrine.

(F) For other disadvantages of a mortgage by demise, see *infra*, n. (I).

B. he, thereupon, demised land to B. for a term of 500 years absolutely, with common covenants against incumbrances, and for further assurance; and then B. the day after, re-demised to A. for 499 years, with condition to be void on non-payment of the money at the day appointed (G). But the common method of mortgaging now, is, by a demise of the land for a term, under a condition (H) to be void on the payment of the mortgage-money and interest with a covenant, inserted at the end of the deed, that, until default shall be made in the payment of the money, the mortgagor shall receive the rents, issues, and profits, without account.

[9]

(G) The great inconvenience attending this mode of mortgaging was, that if the second deed were lost, there appeared to be an absolute term in the mortgagee.

Inconvenience of ancient mode of mortgaging, by having defeasance in a second deed.

It was formerly a common practice to make a mortgage by an absolute conveyance, with a defeasance or clause of redemption in a separate deed. Lord Talbot has said, that this was a wrong way, and to him always appeared with a face of fraud, for the defeasance might have been lost, and then an absolute conveyance might have been set up, which would be very hurtful to the mortgagor. It was therefore a practice which he would discourage as much as possible. *Cotterell v. Purchase*, Ca. Temp. Talb. 64. Bac. Tracts, 37. And Lord Hardwicke observed, in the case of *Baker v. Wind*, that wherever the court found a clause of redemption in a separate deed, it adhered to it strictly to prevent the equity of redemption from being entangled, to the prejudice of the mortgagor. 1 Ves. 161.

(H) Many modern conveyancers have stripped the proviso for redemption of its conditional form, and converted it into an agreement to re-convey on payment of principal and interest. The advantage of the condition is, that if the money be paid on the day appointed, no re-conveyance will be necessary, for by the simple operation of the condition, the land will return to the mortgagee as of his former estate. On the other hand, the disadvantage is, that if the mortgagee assign the mortgage to another before the day appointed for payment of the money, and afterwards the mortgagor pays the money to the mortgagee on the day appointed, the effect of the condition would be to re-vest the estate in the mortgagor, and thereby defeat the security of the assignee. This, it has been attempted to obviate by inserting the agreement above alluded to in the place of the condition. But as no mortgagor would pay off his mortgage without the mortgage deed being delivered up to him, there can be little chance of this inconvenience occurring, and consequently little or no utility in discontinuing the old practice of making the proviso for redemption in a conditional form. This subject is further discussed in § Pres. Conv. 300.

Condition for redemption, and proviso for re-conveyance, distinguished.

Of a covenant to convey the fee to mortgagee after default.

And it is now usual to insert (u), in the mortgage deed of a term for years, or the assignment thereof, a covenant from the mortgagor for himself and his heirs, that, if default be made in the payment of the money at the day, then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct or appoint. For the reversion, after a term of five hundred or one thousand years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, subject to forfeiture, &c. and not capable of the privileges of a freeholder, it is but reasonable, that when the mortgagor cannot redeem the land, the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner (1),

(u) Bac. Abr. 633.

(1) This covenant is generally embodied in the covenant for further assurances. See a form, post, vol. iii.

Term to be assigned.

If the fee on default were to be conveyed to the mortgagee himself, the term would merge in the inheritance. The mortgagee should therefore, previously to such conveyance, assign the term to a trustee in trust to attend the inheritance, if it be wished to keep the term on foot.

Law in text questioned.

The abandonment or foreclosure of the mortgage, will, in the case of a mortgage for years, entitle the mortgagee and his personal representatives to a term only, with all the disabilities respecting forfeiture, felling timber, opening mines, and other restrictions which are incident to a tenancy for years. To obviate these inconveniences, it has been frequently recommended to introduce the agreement alluded to in the text, and such stipulation has in general been considered to be valid and binding on the parties. 3 Bac. Abr. 633. 2 Cru. Dig. 91. It is however open to remark, that inasmuch as a covenant to convert the mortgage into an absolute sale on payment of a further sum by the mortgagee, would be disregarded as ineffectual in a court of equity, see post, p. 119, it should seem that a covenant for the like purpose, without any further advance, would be equally inoperative. At least, a conveyance in pursuance of the covenant would not preclude the mortgagor and his representatives from their right and equity of redemption, if enforced within the period prescribed by the court in analogy to the statute of limitations. See post, p. 360. And hence it should appear, that a conveyance alone under such a covenant, without a foreclosure, cannot be depended on as the source of an absolute and irredeemable title,

Some inconveniences having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose (12), the ingenuity of modern times has framed a mode of conveyance in order to enable the mortgagee, after a given time, to procure his principal and interest by a sale of the mortgaged estates, without being under the necessity of applying to a court of equity; by taking the conveyance of the fee to trustees in trust for the mortgagee for a term of years, subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate and to apply the purchase-money, after defraying the expences incurred in discharging the trust, in the payment of the mortgage-money and interest, and then to pay over the residue, if any, to the mortgagor.

Of mortgages with powers of sale. See note, (K), page 12, et vol. iii.

[10]

I am not aware that any case has occurred where the transaction appears to have been, *in its original nature*, a mortgage or pledge by way of security for money, in which the validity of a sale, under a trust of this nature, vested in trustees, without the concurrence of the mortgagor or his representatives, or a decree for foreclosure, or for sale for payment of the money lent, has come under the consideration of a court of equity; but unless such trust for sale be considered as clearly distinguishable *in principle* from a power to sell in default of payment at a limited period, lodged in the mortgagee himself, the opinion of the court in the case of *Croft v. Powell* (w), seems to me to raise at least considerable grounds for doubting, whether the trustees alone, in such a case, can make an absolute irredeemable title, without the direction of a court of equity.

In that case, A. seized in fee of an estate by lease and release, in 1703, conveyed the same to B. and his heirs; and by a deed of defeasance, bearing even date with the release, and

(w) Com. Rep. 603.

(12) There is one instance on the books of a ten years' suit, four reports, two trials at law, and after all the foreclosure was re-opened, *infra*, 306. See also, vol. ii. p. 998, where a fourth order for enlarging the time of foreclosure was granted, although the preceding order was peremptory.

*Of mortgages
with powers of
sale.*

[11]

executed at the same time, it was agreed, that if A. should repay 1000*l.* borrowed, together with other sums,—agreed to be paid off within the space of one year, then B. should re-convey to him; but, if he failed to pay that money within the year, then B. *should mortgage or absolutely sell the same lands free from redemption*, and out of the money raised by the sale or mortgage, pay the money and interest, and account for the overplus to A. Several other sums were afterwards advanced to A. or paid on his account by B. and a fine was afterwards levied by A.'s wife to B. Some years afterwards, the money not being paid, B. entered into articles of agreement for the sale of this estate, and afterwards conveyed the same to C. in which articles and conveyance *the defeasance was mentioned and excepted*. It was in proof that A. was privy and consenting to the agreement for sale. Afterwards A. exhibited a bill to redeem. It was insisted, among other arguments, that C. had an absolute estate not redeemable, and that the defeasance operated only in case the money was paid within a twelvemonth, if not, B. was invested with a power to sell, free from all equity of redemption; that *then* it became a trust in him to sell. But it was resolved by the court, that the estate *was redeemable*, and this decree was afterwards affirmed in Parliament.

The court availed itself of a variety of grounds in support of this judgment; it was said, that the premises being conveyed to B. and his heirs, with a defeasance by deed of the same date, *it was in its nature a mortgage to him, and therefore was in his hands redeemable at any time upon payment of principal and interest*. It was further observed, that though B. had a power for non-payment of the money within the year, to mortgage or sell to raise the money lent, and to be accountable for the overplus, it was not *then* to be considered what he *might* have done, but what he had done; and that it was manifest it was not B.'s intention to give C. an absolute and indefeasible estate; for it was not conveyed to him absolutely and free from the equity of redemption; but while the articles of agreement were writing, B. shewed C. the defeasance, and insisted to have it mentioned in the articles; and when the conveyance was executed, it was with an exception of the defeasance, that

was, subject to it. And the court distinguished this case from that of a trustee who was authorized by will, &c. to sell for payment of debts and legacies; *there was no original mortgage*, but the trust was directly to sell, and *there was nobody to redeem*, for as the trust was to sell absolutely, the purchaser could not be subject to redemption, and the heir was at no prejudice, if the purchase-money were more than would satisfy the debts and legacies, he would in equity be entitled to the overplus. And it was said, that it could not be well conceived that if C. expected an absolute estate, free from redemption, he would not have insisted that A. should have joined in the conveyance; and that it was a known rule, that if a trustee conveys, though upon a valuable consideration, to one who has notice of the trust, he was liable in equity to the performance of the trust: If then B. on non-payment within a year stood a trustee, as it was insisted for A., his (B.'s) vendees coming in with notice of that trust, would stand in the place of B. himself, who was acknowledged to be subject to redemption.

From this statement of the reasons on which the court decided in the last case, it seems that, in the judgment of the court, great reliance was placed upon the circumstance, that the transaction was in its nature a *mortgage*, and therefore was in the mortgagee's hands *redeemable at any time* upon payment of principal and interest; and on that ground it was distinguished from a trust to sell for payment of debts and legacies; in which case there was, it was said, no original mortgage, but the trust was directly to sell, and no one to redeem. And the purchaser, though he contracted and purchased subsequent to the period at which the power of selling was to take effect, was nevertheless considered as acquiring a redeemable estate only; and yet it was fairly contended, that whatever might be the nature of the estate while in the hands of the mortgagee, as between him and the mortgagor, yet, after the time for payment expired as between a purchaser and the mortgagee, he became a trustee for the purpose of sale, and his vendee would, by his sale in pursuance of his power and trust, have an absolute irredeemable estate.

*Of mortgages
with powers of
sale.*

Now, though it may be true that there is an obvious difference in point of circumstances, yet there is no difference in substance between the case where the power of sale is vested in the mortgagee, and where it is created by a distinct trust; for if the trust be warranted in point of equity, a court of equity will distinguish and separate the two characters of mortgagee and trustee, though united in one person; and if the trust be not supportable in point of equity, such court will confound the character, though branched into two persons; consequently, if the principle be, that the transaction being in its nature a mortgage, the mortgagee cannot avail himself of any collateral contract whereby he may acquire an irredeemable estate, without the subsequent concurrence of the mortgagor, or a decree of a court of equity—Equity, which attends to the material or substantial contract, without considering mere matters of form, will resist the innovation in whatever shape it appears; the validity of such a trust, therefore, seems at present of too doubtful a complexion to be relied upon as the source of an irredeemable title (K).

*Good title may
be made under
trusts for sale,
in default of
payment of
mortgage money.*

(K) This point is now fully settled. Two cases have been decided since the learned author wrote, and they concur in establishing the rule, that trustees for sale, in default of payment of the mortgage-money, are competent to make a good irredeemable title, without the consent of the mortgagor or his representatives, provided that power be communicated to them by the trust-deed.

In the first case, a mortgage of leaseholds was made to a trustee, with the usual power of redemption, and it was agreed, that on default of payment of the money, the trustee might sell the estate, pay off the mortgage-money, and refund the residue to the mortgagor. Default was made in payment; the trustee sold the estate by public auction, and the purchaser required the concurrence of the mortgagor, who refused to join, insisting that the sale was made without his consent, and at an undervalue. Upon which the purchaser filed a bill against the trustee, and the mortgagor (who afterwards becoming a bankrupt,) the purchaser filed a supplemental bill against his assignees. On the hearing of the cause, the court dismissed the bill as against the mortgagor and his assignees, with costs; and decreed a specific performance against the trustee and his *cestui que trust*. *Clay v. Sharpe*, Lib. Reg. Mich. 1802. fo. 66. Sugd. Vend. & Pur. App. 21. 2 Cru. Dig. 105, 2d edit.

In the second case, A. who had already made one mortgage, made a second to B. in fee, subject to the first, for securing 500*l.* and interest, and also such other sums as should from time to time be advanced, with the usual proviso for redemption, and a declaration, that in case default should be made in payment within fourteen days after payment demanded, it should be lawful for B. and he was thereby required, of his own proper authority, and without

If a bond be given by the mortgagor to the mortgagee, ^{Bond to perform covenants.} conditioned for the performance of all covenants, payments,

any further authority or direction from the said A. his heirs, &c. to make sale of the hereditaments thereby released, either absolutely or conditionally and by way of mortgage, or to lease the same for any number of years, at such rents as he should think proper; his receipts to be good discharges; and the purchasers not to be liable to see their monies applied. The trusts of the money arising from the sale were declared to be, first to pay the expences of sale, next to pay off the first mortgage, unless the sale should be subject to that mortgage, then to pay off the present mortgage to B. and after to pay the surplus to A. his executors, &c. And it was covenanted, that in case the hereditaments should be sold, the said A. should join in the sale, and execute the conveyance; nevertheless, it was declared his joining should not in anywise be essential or necessary to perfect the title of the purchaser or purchasers, the same being intended for the further satisfaction of such purchaser or purchasers.

The plaintiff took an assignment of the first mortgage, and having given the proper notice, agreed to sell the premises to the defendant; and the bill prayed a specific performance of that agreement. Sir William Grant, Master of the Rolls, said, that when the cause was opened, he was unable to suggest any principle on which the defendant could properly insist on the mortgagor's being a party to the conveyance. The clause in the deed, whereby the mortgagor undertook to join in the conveyance, was a mere contract between the mortgagor and mortgagee, to the benefit of which the defendant, as a purchaser, could not be entitled; and there was nothing in the nature of the contract between the plaintiff and his mortgagor, which prevented the latter giving, and the former exercising, such a power of sale as that on which the question arose. A specific performance was consequently decreed according to the prayer of the bill. *Corder v. Morgan*, 18 Ves. 344.

The case of *Croft v. Powell*, quoted and commented on in the text, does not appear to have decided any thing contradictory to the preceding cases. On the validity of the power of sale, and the extent of the estate to be derived under it, nothing was determined. It was in that case admitted, that the consideration of what the mortgagee might have done under the trusts, was irrelevant to the question before the court, and therefore speculations on that subject were unnecessary. The case, too, received its adjudication entirely on another point, and ought not, therefore, to be considered as deciding a question at which it merely hinted.

The case of *Stabback v. Leat*, Coop. 46, when attentively considered, does not militate against the doctrine laid down in the former part of this note. The report of that case is said to have been taken from a hasty note on a brief, and to have very little to recommend it, either in terms or in substance. See also *Clay v. Willis*, 1 Barn. & Cress. 364, where a mortgage with trusts for sale, made in the year 1795, was treated and acted on by the court of K. B. as perfectly valid.

The form of a mortgage with trusts for sale, will be found in the 3d volume, where the merits of the several modes in use are discussed and the best mode pointed out.

Bond to perform covenants.

articles, and agreements, comprised in the mortgage deed, non-payment of the mortgage-money, according to the proviso in the deed for re-payment at a certain day or days, will be a breach of such condition.

[14]

This question seems to have been first agitated in the case of *Briscoe v. King* (x). There a deed of feoffment was made in consideration of 110*l.* with a proviso, that if the feoffor paid such sums at such a day, the feoffment should be void, and he might re-enter; with covenants to save harmless from incumbrances, and to make farther assurance. And there was also a bond from the feoffor, conditioned for the performance of all covenants, payments, articles, and agreements, comprised in the deed. On an action upon this bond, the breach was assigned, for that the feoffor did not pay such sums upon such days according to the proviso. And thereupon there was a demurrer, and it was contended, that in regard the feoffor was obliged to perform the payments, articles, and agreements, in the deed mentioned, and there was not any payment mentioned but what was mentioned in the proviso, therefore he was obliged to perform that: but the court said, for as much as there was not any covenant, it was a proviso in advantage of the feoffor, that if he paid the money he should have his land again; and it was in his election to pay the money, or to lose his land, which would be a sufficient loss unto him; therefore the condition of the bond did not extend thereto, but was confined to the other covenants, namely, to save harmless from incumbrances, and rents and arrearages of rents. But in respect that, if judgment should be entered, the obligee would lose his bond, they gave a day to advise until the next term, that in the interim the parties might compound.

But in the case of *Tooms v. Chandler* (y), in which debt was brought upon an obligation to perform all the covenants and conditions in an indenture of mortgage; in which indenture there was a proviso, that if the mortgagor paid the money at the day, the mortgage should be void. A breach was assigned

(x) Cro. Jac. 281. Yelv. 206.
2 Lev. 116.

(y) 2 Lev. 116. 3 Keb. 387. 79.

in non-payment of the money at the day, upon which there was a demurrer. Hale was at first of opinion, upon the ground mentioned in the preceding case, that this was no breach; but Twisden held otherwise, and cited a case of *Westbrook*, Hil. 22 Car. 1. B. R. Rott. 116, to have been so adjudged; whereupon the case was adjourned: and afterwards, at another day, Twisden brought the record of *Westbrook's case* into court, upon which Hale changed his opinion, and gave judgment for the plaintiff.

But taking the bond with a condition for performance of covenants, frequently occasions difficulty in the pleadings in assigning the breach, and embarrasses the mortgagee. The better mode seems to be, to take a bond simply conditioned for payment of the mortgage-money (L).

[15]
Simple mortgage bond preferable.

(L) The use of the mortgage bond is to enable the mortgagee to recover the deficiency of his debt by an action on the bond, in case the estate, on a foreclosure and sale, should prove inadequate to the burthen of the mortgage-money. *Took v. Hartly*, 2 Dick. 785. 2 Bro. Ch. Ca. 125. *Perry v. Barker*, 8 Ves. 527. If, however, a mortgagee, having a decree of foreclosure signed and enrolled, afterwards brings an action of debt on the bond given at the same time as the mortgage, for payment of the same money, and for performance of the covenants of the mortgage-deed, such action re-opens the foreclosure, and revives the equity of redemption of the mortgagor. *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317. In the case of *Perry v. Barker*, 13 Ves. 198, where the mortgagee obtained a decree of foreclosure, and sold the estate for 130*l.* less than his mortgage debt, and afterwards brought an action on the mortgage-bond for the deficiency, and the mortgagor filed a bill praying a redemption, and also an injunction, for ever restraining the defendant from proceeding on the bond. The Lord Chancellor assented to the rule, that the action on the bond revived the redemption, but said, that as there was no probability of the mortgagee getting the estate back again, it having been sold a considerable time ago, and as the mortgagee's demand was so inconsiderable, the proper decree was an injunction, which was accordingly granted, agreeably to the prayer of the bill, *et infra*; 1002, 3, 4.

Utility of mortgage bond.

Action on; re-opens redemption.

Both at law and in equity, the penalty of the bond is considered the debt, and consequently, although the interest may increase the principal beyond the penalty of the bond, yet no more than the penalty can be recovered. *White v. Sealy*, Doug. 49. *Wilde v. Clarkson*, 6 T. R. 303. *Mackworth v. Thomas*, 5 Ves. 329. *Clark v. Seaton*, 6 Ves. 415. *Atkinson v. Atkinson*, 1 Ball & Bea. 238, *infra*, 357, n.; except where the penalty and debt are of equal amount, and the condition provides that the principal sum shall carry lawful interest. *Francis v. Wilson*, 1 Ry. & Moo. 106. And this rule holds, notwith-

Bond a security to amount of penalty only.

Money to remain for a given time.

It is not unusual, for the party lending the money, to stipulate that it shall lie on the land for a given period of time, which agreement is made part of the deed, and hath been

standing a mortgage might have been given for securing the same debt as that which is collaterally secured by the bond, and although it be the case of a surety. *Clarke v. Abington*, 17 Ves. 106. 1 Doug. 49. But although a court of equity will not carry interest higher than the penalty of the bond, yet when it is tacked to another security, as where there is a mortgage from the obligor to the obligee for securing other sums of money, equity will not suffer the mortgagor to redeem, unless he will pay the interest which is over and above the penalty of the bond. *Peers v. Balmlyn*, 2 Eq. Ca. Abr. 611, pl. 4. The learned author adds a quære to this case, in p. 355, post, n. (u), on the ground that tacking is an equity merely to avoid circuitry of action. But the case seems to have turned on another point. The mortgage was for securing further advances, and the excess of interest above the penalty could easily be considered as accumulations from time to time in the nature of additional sums lent. The reporter also considers it a very equitable case; for certainly (says he) it is agreeable both to reason and conscience, that the interest should be paid when the obligor has so long neglected payment.

Mortgagee may proceed in equity and sue at law at same time. S. L. infra, vol. i. 204. ii. 966.

It is a rule, that when a party is suing in a court of equity, he shall not be allowed to sue at law for the same debt. But the case of a mortgagee is an exception to this rule; he has a right to proceed on his mortgage in equity, and on his bond at law at the same time. But the mortgagor is not compellable to pay the money on his bond, if he is in danger of not getting back his title-deeds, and therefore, where a mortgagee, having possession of the mortgagor's title-deeds, lodged them with an attorney, who claimed a lien on them for business done, the mortgagee was restrained from proceeding at law on his collateral security, until the title-deeds were secured and a re-conveyance could be had. *Schoole v. Sall*, 1 Sch. & Lef. 176. So where the mortgagee died without an heir, the court restrained his executor from proceeding at law to compel payment of the money, there being no heir who could re-convey. The money was ordered into court, and after some time an act of parliament was procured, on an allegation that the heir could not be found. *Ibid*.

Construction of mortgage bond.

The condition of a bond is to be construed by its own terms, and no evidence can be received to explain its import; but although the language be not clear, if there be enough to shew the intention of the parties, the court will give it effect; as where, upon a second advance, it appeared that the parties intended there should be a further security, the court construed the condition to be operative as an agreement for a further mortgage. *Hearn Ex parte*, 1 Buck's Bank. Ca. 165.

Covenant for payment of money, and mortgage bond, compared.

Some gentlemen consider a mortgage bond as taken *ex abundante cautela*, and they rely on the covenant for payment of the money which is introduced in the mortgage-deed, thereby saving the expence of the bond. As often as economy shall be an object, this mode of security seems entitled to sufficient confidence to be adopted; but with respect to bankruptcy, and facility in recovering the mortgage-debt, a bond is a very useful and necessary appendage

considered by the best authorities as binding upon the parties (M).

to a mortgage security. Indeed, it has been holden in one case, that as every mortgage implies a debt, the mortgagor's personal estate will be liable, although there be neither a bond nor a covenant for payment of the mortgage money. *King v. King*, 3 Pr. Wms. 361. S. L. *infra*, vol. ii. 774. This is an extreme case, and no one on the authority of it would omit to insert a covenant for payment of the money, or neglect to take a mortgage bond, unless the poverty of the parties required it. In 2 Dick. 785, a bond and covenant are said to be of no use if the estate be ample; but for the necessity of a bond and covenant, see *infra*, 61 and 866, notes (E) and (X).

The utility of a bond; however, must be apparent on considering, that an action of covenant does not lie against a devisee. At common law, no such action lay, and there were, consequently, no means of subjecting the debtor's lands to the process of his creditors, in the hands of a devisee. The statute of fraudulent devises, (3 W. & M. c. 14.) remedied this inconvenience to a certain extent. It rendered the devisee chargeable jointly with the heir for the debts of his testator. But the words of the statute apply only to actions of debt on bonds and specialties, and do not extend to actions of covenant. *Wilson v. Knubley*, 7 East, 128. Mr. Jacob Phillips (whose excellent course of legal study is, in the Editor's view, the only one likely to ensure a good result, because, without any super-human endowment, it can be minutely pursued,) observes on this subject, that in an action of covenant the benefit of the statute of fraudulent devises is lost; and the debtor cannot follow the lands to a devisee; but in an action of debt he can. "Hence" continues the learned gentleman, "there is an immense superiority of an action of debt over covenant; and as all lands may be said to be now devised, that is, as almost every man having real property makes his will and devises it, and which exempts it from liability to his covenants; and also, as if he does not devise it, but permits it to descend to his heirs; yet as their alienation will also exempt it from liability to covenants, a covenant is really but little better in extent of remedy than a simple contract debt: always then on a mortgage take a concurrent mortgage bond, and not trust to the mortgage covenant for payment of the money." *Phil. Let. Grands*. 141.

(M) This stipulation is for the most part introduced in the proviso. But the insertion of it by way of covenant, at the end of the mortgage covenants, is to be preferred. Forms for each case will be added in the 3d volume, for which refer to the Index.

CHAP. II.

OF THE POSSESSION OF THE THING MORTGAGED, AND WHEN IT OUGHT TO BE GIVEN BY THE MORTGAGOR TO THE MORTGAGEE.

Mortgage,

A MORTGAGE being, as has been stated, a contract of sale executed, with power to redeem, must have all the properties and qualities incidental to the validity of an absolute disposition.

must be free from fraud, (A).

An essential circumstance necessary to the validity of every conveyance of property, whether real or personal, is, that it be perfectly free from fraud or collusion; which are things the common law universally abhors, and, therefore, makes void all acts that depend upon them, though otherwise in themselves good.

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by several statutes.

With a view to enforce this principle, several statutes have made void all fraudulent conveyances of lands, tenements, hereditaments, goods, and chattels, as against creditors and purchasers (a).

Vendor retaining possession, when a fraud.

But what circumstances amount to fraud or covin, is always a question of law upon the facts of each particular case. Among other incidents which have been considered as fraudulent, we find that of the vendor continuing in full possession, and having the power of using things conveyed as his own, after an absolute and unqualified alienation; whereby the vendor is enabled to defraud and deceive others, by continuing to traffic with the subject by him before conveyed to another.

(a) 50 Edw. 3. c. 6. 13 Eliz. c. 5. 27 Eliz. c. 4. 21 Jac. 1. c. 19.

(A) But mere folly without fraud is no foundation for equitable relief. A binding contract, obtained without misrepresentation, can never be set aside. *Milnes v. Cowley*, 8 Price, 620.

This observation leads us to investigate what degree of possession of a thing mortgaged ought to be given up by the mortgagor, to prevent the mortgagee from the imputation of fraud in respect to third persons; and in the pursuit of this inquiry, it will be necessary to consider, First, What things are capable of being mortgaged: Secondly, In what state or condition they may be mortgaged: Thirdly, The extent in which their nature, state, or condition, varies the degree of the possession, which ought to be given of them. Division.

First, As to what things are capable of being mortgaged (A 2). What may be mortgaged:

Every thing which may be considered as property, whether, in the technical language of the law, denominated real or personal property, may be the subject of a mortgage. All real and personal property,

Advowsons, rectories, and tithes, may be the subject of a mortgage (a a). Advowsons, rectories, tithes,

(a a) [See further on the mortgage of ecclesiastical benefices, vol. iii. Index, Rectory.—Ed.]

(A 2) This necessarily involves the consideration of what things may not be mortgaged. A creditor cannot seize the necessary wearing apparel of his debtor, nor his bed, nor other moveables and utensils that are of like necessity to him. Nor by the common law can a landlord distrain beasts of the plough, utensils or instruments of trade or profession, as the axe of a carpenter, or the books of a scholar; because of the damage which may accrue to the commonwealth by the interruption of trade and commerce. Co. Lit. 47 a. Infra, 18 a. n. (A 4.) These things therefore cannot properly be the subjects of mortgage or pawn, without delivery of actual possession. What may not be mortgaged,

Neither may a pew in a parish church, as it should seem, be mortgaged as a thing in gross. There is no property in pews; they are erected for the use of the parishioners. The ordinary may grant a pew to a particular person, while he resides within the parish; or there may be a prescription by which a faculty is presumed; but as to personal property in a pew, the law knows no such thing. *Hawkins v. Compigne*, 3 Phil. Ecc. Rep. 16. If, however, the pew be appurtenant or annexed to a house, it may be mortgaged with the house, and if it be in the chancel, it may perhaps be assigned in gross. See *Mainwarring v. Giles*, 5 Barn. & Ald. 361. Pew.

Nor can a flowing stream of water be the subject of mortgage, for it is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose. *Williams v. Morland*, 2 Barn. & Cress. 910. Water.

So of a rookery as a distinct article of property. *Hannam v. Brockett*, Rookery. 2 Barn. & Cress. 934.

*Reversions, and
remainders;*

Reversions and remainders, being capable of grant, from man to man, are mortgageable.

Possibilities,

Possibilities, also, being assignable, are mortgageable, a mortgage of them being only a conditional assignment (A).

*Mortgage of
contingent in-
terests and ex-
pectancies.*

(A) Possibilities are generally arranged into two classes: the one, consisting of possibilities, which are coupled with an interest, such as contingent remainders, executory devises, springing or shifting uses; the other of bare or naked possibilities, such as the hope of inheritance entertained by the heir on the courtesy of his ancestor, or the chance of succession of an individual where the gift is to several, with remainder to the survivor. The former class may, perhaps, with more propriety be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest, is more than a possibility, it is a present interest, and may be devised. *Perry v. Phillips*, 17 Ves. 173. 182. On the other hand, the expectancy of an heir apparent, during the life-time of his ancestor, is less than a possibility, being but a mere hope or anticipation. All contingent interests are executory, and while they remain so, the owners cannot assign them at law, because they have not any estates. 10 Co. 50 a. 4 Co. 66 b. 1 Inst. 264 b. 265 a. b. n. 212. 1 Ves. 390. 409. 3 Ves. 391. 3 T. R. 88. 7 T. R. 589. In equity every species of contingency may be bound by contract for valuable consideration. 1 Ves. 409. 2 Pr. Wms. 132. 191. 2 Atk. 420. But an expectancy cannot be sold. 3 Meriv. 667. Hence it appears reasonable to suppose, that an additional contract for a contingent interest, would have greater claim to validity in a court of equity than an absolute sale; for it does not take advantage of necessity or inexperience by binding the party to a price which is really less than the value of the expectancy, it being a redeemable contract on payment of the sum actually advanced. Contingent interests and mere expectancies may however be bound at law by estoppel. *Helps v. Hereford*, 2 Barn. & Ald. 242. But it is observable, that although the contract or conditional bargain of an expectant heir will bind himself, yet it will not, as it should seem, bind the succeeding heir. 1 Anstr. 11. See more on Possibilities and Estoppel, 1 Fonbl. Tr. Eq. ch. 4. s. 2. 2 Pres. Abs. 92. 202. 205. 1 Madd. Ch. 549. 2d edit. *Hooper v. Rossiter*, 1 M'Lcl. 527.

*Of mortgages
by expectant
heirs.*

If a father devise lands to trustees and their heirs, until his son attain the age of twenty-five years, a mortgage by the son, when only twenty-one, is void. *Spencer v. Chase*, 9 Mod. 30. In another case it was held, that if an improvident heir takes up goods at an extravagant price, and mortgages to secure it, he may be relieved so far as it stands as a security for the unjust gain; but after it is determined on a *quantum meruit*, what was the real worth of the goods, the mortgage will still be binding on the heir for so much as is found by the verdict. *Freeman v. Bishop*, 2 Atk. 39. S. C. Barnard. 15. That the expectancy of an heir is not an interest, was acknowledged by Lord Loughborough, C. J. 1 H. Bl. 351; and in *Carleton v. Leighton*, 3 Meriv. 667, the expectancy of an heir, either presumptive or apparent, was held not an interest or possibility capable of being made the subject of [absolute] contract.

Rents, also, and franchises, as views of frankpledge, perquisites of courts, leets, fairs, markets, goods of felons, waifs, Rents, franchises, &c.

The mere dealing on an expectancy, induces a court of equity to entertain suspicion and almost to imply fraud, and Lord Eldon is reported to have said, that he was not aware of any case which proceeded on the distinction between such expectancies as were certain, and such as were contingent. *Evans v. Cheshire*, Belt's Supp. to Ves. 305.

The general result of the cases seems to be, that expectant heirs dealing Same, for their expectancies are entitled, for mere inadequacy of price, to have the contract rescinded upon terms of redemption. *Knott v. Hill*, 1 Vern. 167. *Peacock v. Evans*, 16 Ves. 512. *Roche v. O'Brien*, 1 Ball & Bea. 350. *Gowland v. De Fairs*, 17 Ves. 20. *Darley v. Singleton*, Wightw. 25. *Bowes v. Heaps*, 3 Ves. & Bea. 117. *Brooke v. Galley*, 2 Atk. 34. *Coles v. Trecothick*, 9 Ves. 234. The proof of adequacy lies on the purchaser. It may indeed be true, that in many cases, those who obtain relief from their annuities, have really taken as much advantage of the annuitants as the annuitants have taken of them. Yet in a late case the Lord Chancellor said he must admit that it was clearly established, that if a person has dealt with an heir apparent, for interests of which he is not in present possession, the Court of Chancery extends to the heir the benefit of this principle, with reference to those so dealing with him, that it does not rest on him to shew that the bargain was unreasonable and improvident, but on them to shew that it was reasonable. *Davis v. Duke of Marlboro'*, 2 Swan. 139. *S. L. Shelly v. Nash*, 3 Madd. 236. *Bernal v. Donegal*, 3 Dow, 151. *Hooper v. Rossiter*, 1 M'Lel. 527.

This doctrine appears to be founded, in part, on the policy of maintaining Same. parental authority and preventing the waste of family estates; 1 Pr. Wms. 312, 3. 3 Ib. 293. 1 Wils. 323. 2 Ves. 144. 155. Barn. 6. 1 Bro. C. C. 910; and in part on the equity of protecting against the designs of that calculating rapacity which the law constantly discountenances, the distress frequently incident to owners of profitable reversions, and the improvidence with which men are commonly disposed to sacrifice the future to the present. 2 Atk. 135. Barn. 241. 3. 2 Ves. 149. 155. 1 Atk. 346. 353. 1 Wils. 323. 3 Ves. & Bea. 119.

The latter principle seems to comprehend every description of persons dealing for a reversionary interest, but it may be doubted whether the course of decision authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. The reversionary interests, the sale of which has been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every case except the following: *Wiseman v. Beake*, 2 Vern. 121. *Cole v. Gibbons*. 3 Pr. Wms. 290. *Barnardiston v. Lingood*, 2 Atk. 133. *Bowes v. Heaps*, ubi supra; and *Gould v. Oakden*, 4 Bro. P. C. 198; but in these cases, the sale had been contracted while the vendor was in distress. And it should be observed, that the rule is not applicable to sales of reversionary interests by auction. *Shelly v. Nash*, 3 Madd. 232, *et vide*

estrays, hundreds, ferries, warrens, and the like, may be made the subject of a mortgage (A 4).

Secondly, What state, or condition, things, capable of being mortgaged, may be in for that purpose.

Lands, tenements, and hereditaments, with respect to their capacities of being mortgaged, may be viewed in two lights; viz. First, as to their intrinsic nature:—Secondly, as to the estate possessed in them.

First, All lands are, in respect of their intrinsic nature, mortgageable; but notwithstanding they are so mortgageable;

Mr. Swanston's collection of authorities on this head of equity, 2 Swan. Rep. 139, whence these paragraphs have been in part extracted.

The following note of an early case on this subject is also given by that learned gentleman from Lord Nottingham's MSS. "9 Feb. 33 Car. 2. 1680. Berney was drawn into several securities, for money to be paid after his father's death, who then was infirm and kept alive by art; by some of which securities he was to pay five for one, and by this means he was involved in debt to the value of 50 or 60,000*l.* in all which he appeared to be circumvented and beset, most of the money pretended to be borrowed being raised by the delivery of wares at excessive prices, in parcels of wine, hemp, cambric, and jewels, which could never be sold for a quarter of the price at which they were delivered; but the plaintiff's necessities for money being increased by having his creditors under-hand procured to fall upon him, he was willing to take up money upon any terms, and gave statutes and judgments in great penalties; against which he now prayed relief by bill, 1. I made him pay the principal money borrowed, before I would grant an injunction till hearing. 2. At the hearing, I relieved him against all the rest, notwithstanding he were of full age at the time; for this infamous kind of trade and circumvention ought at all times to be suppressed; the Star Chambers used to punish it, and this court did always relieve against it. No family can be safe if this be suffered. Fairclough, Smith, Beak, Mason, Tyson, and Pargeter, were defendants; but Mr. George Pitts prevailed, and the bill against him was dismissed, though he gained above three to one; for it was in the time of the father's health, three years before his death, without any circumvention or practice, and upon express agreement to lose the principal if the son died in the life-time of his father, which differed it from all the other cases." 2 Swan. 142.

(A 4) And generally *quod emptionem venditionemque recipit, etiam pignorationem recipere potest*. Dig. lib. 9. s. 1. But *eam rem quam quis emere non potest, quia commercium ejus, non est jure pignoris accipere non potest*. Ibid. lib. 1. s. 2. Ante, 17 a.

yet, in respect to the estate and property that the owner has in them, they may be otherwise; as if he be but tenant at will of them. *Tenant at will cannot mortgage,*

Secondly, As to the estate in lands, tenements, and hereditaments, necessary to make good a mortgage, it may be observed, that any estate which a man has in fee simple, fee tail, for life, or years, in any lands, or in any rent, or profit out of the same, may be mortgaged. *Every other tenant may.*

And if tenant in tail, and he that is next in remainder in fee, join in a mortgage, and after the tenant in tail dies without issue, in this case it is a good mortgage against him in remainder. *Mortgage by tenant in tail and remainderman,*

So if there be joint-tenants, either of them may mortgage his undivided part or share (B). And the law is the same with respect to tenants in common, co-partners, &c. *Joint-tenants, &c.*

Personal things, as goods and chattels are likewise, in point of locality, moveable or immoveable, present or remote; and they admit of several rights therein, generally described under the terms "rights in action," which include all personal things in action, and rights in possession, which include all personal things in possession. And these rights may be mortgaged in various modes according as the things to which they relate are circumstanced in point of locality; which circumstance gives rise to several distinctions as to the degree of possession of which they respectively admit, which will be better explained under the third head of inquiry, viz. *Chattels.*

[19]

Thirdly, How the nature, state, and condition of things in mortgage, vary the degree of possession, which ought to be given of them.

(B) Such mortgage will, however, be a severance of the tenancy, post, 1023; but if it be for a term of years, it will be a severance *pro tanto* only. *Mortgage a severance.*
Clerk v. Clerk, 2 Vern. 323. - *Dyer*, 187. Co. Lit. 186 a. b. Cro. Jac. 91.
 2 Brownl. 175.

Real and personal property distinguished as to retention of possession by vendor.

And in this respect, there is a material and obvious distinction between real property, of which the vendor is in the visible possession, and personal property, of which the vendor is in such possession; for since the visible occupation and usure of land, furnish no evidence whatever that the possessor is entitled to the property, because visible occupation and usure may not only be founded on wrong, as commencing in a disseisin, or the like, but, though rightful, admits of a variety of qualifications; some other evidence than mere possession is necessary to evince property therein. Before the introduction of written instruments, it was only to be found out by resorting to the vicinage, who, when no transfer could be made but what was attended with acts of general notoriety, were well acquainted with each other's title; and since the introduction of deeds, and the invention of transfer through the medium of uses, it is only to be found out by resorting to the title-deeds. But personal things, when present, being absolutely in the power of the holder of them, the occupation thereof is the strongest index of ownership; for since there is no way of coming at the knowledge of who is owner of personal things, but by seeing in whose possession they are, there is no other medium for deciding on the property but by concluding its annexation to that possession.

Retention of possession a fraud as to personality, but not as to reality.

The law, then, which must always be so moulded as to correspond with the intrinsic nature of things, does not consider the retaining the visible possession of land, after the property is parted with, as any badge of a fraudulent intention of the parties to deceive third persons; because the visible possession, being in its nature ambiguous, as it may be in the hands of the tenant as well as the owner, no prudent man will, in contracting, lay any great stress on that circumstance, as a proof of title, but will require the deeds as the only true test of the property. But, upon the same principle, the law considers the visible retention of the possession of personal things, after the cession of the property, *prima facie*, as an indication of fraud; because it is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods, for the reason holds equally in both cases, should leave them with the vendor, unless the transfer were only colourable, or

the parties had in view the procuring a collusive credit to the vendor, from his possessing that, which, in fact, is the property of another,

In this view of effects of possession, in evincing the right of property, we find, that in respect of real things, the possession of the title deeds is, *prima facie*, as to them, what the possession and usure of personal things is, as to personal things; and by a necessary analogy, the retention of the visible possession of the former in the one case, ought, it should seem, *if permissive*, to be equivalent to the retention of the possession of the latter in the other case,

I shall therefore first consider, in what cases possession retained, after a conditional sale, is fraudulent in respect of personal things, and the exceptions to the conclusion of fraud from that circumstance; and, secondly, the applicability of the cases, and reasoning thereon, to the instance of possession retained of the title-deeds, *with the privity of the mortgagee*, after a conditional sale of real things (c). Division.

(C) To obviate in some measure the apparent confusion which pervades the sequel of this chapter, it may be useful to remark, that the chapter treats of the construction of three several statutes, which have for their object the prevention of fraud, and contain many provisions of a very similar nature. The division adopted also throws them out of their chronological order, whereby they assume a seeming irregularity. The first statute is that of 13 Eliz. c. 5. s. 2. made perpetual by 29 Eliz. c. 5. This act aims at the avoidance of all deeds made with an intent to defraud creditors, declaring them to be void, and rendering the thing or chattel mortgaged liable to the execution of existing or subsequent creditors. It relates to creditors only, but it includes things personal as well as things real. It enacts, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, and hereditaments, goods and chattels, or of any lease, rent, or other profit or charge out of the same, shall be deemed and taken only as against the person or persons, their heirs, executors, administrators, or assigns, whose action by such covenants or fraudulent devices, shall be in any wise disturbed, hindered, or defrauded, to be void and of none effect; any pretence, colour, feigned consideration, expression of use or other matter or thing to the contrary. The second statute is that of 27 Eliz. c. 4. s. 2. made perpetual by the 30 Eliz. c. 18. commencing at p. 48, post, and concluding the chapter. This statute relates to purchasers and real estate only. 1 Meriv. 635. 1 Sim. & Stu. 317. The third statute is that of 21 Jac. 1. c. 19. occupying

As to the division.

Stat. of fraudulent conveyances.

Stat. 27 Eliz. relates to real estate only.

Vendor retaining possession of things personal, a fraud,

With respect to the condition in which creditors or purchasers stand, in relation to sales prejudicial to them, where the vendor continues in possession of goods sold, two statutes present themselves, in the first place, to our observation, *viz.* 13 Eliz. c. 5. and 27 Eliz. c. 4, which statutes, no distinction being therein made between conditional and absolute sales, provided they are fraudulent, must be considered as applicable to both instances (*b*); it being a settled rule of construction, "That statutes made against fraud shall be liberally and beneficially expounded, so as to suppress the fraud (*c*)."
And conveyances, made to the end, purpose, and intent, to defraud creditors and purchasers, being by these statutes, as to such creditors and purchasers, declared void, it became incumbent on courts of law and equity, which, in such cases, have a concurrent jurisdiction, on considering all the circumstances of each case, to decide whether a conveyance was made with intent to defraud. And in the exercise of this discretionary power, given by these statutes to adjudge of the intent from the circumstances, it has been held as to creditors, in respect to goods, that any neglect in leaving the vendor in possession, after absolute alienation of the property, which naturally tends to deceive creditors, is fraudulent within the statute of the 13th Eliz. (*d*); and accordingly, in *Twine's case*, wherein it was resolved, that the gift then in question had the signs and

(*b*) *Twine's case*, 3 Rep. 81.

Rowles, 1 Atk. 165. *Brown v. Heath-*

(*c*) *Stephens v. Sole*, 1 Ves. 352. 358.

cote, Ibid. 160.

1 Atk. 157. *Barn.* 207. *Ryall v.*

(*d*) 3 Rep. 81.

Stat. 21 Jac. 1. relates to real and personal estate, but confined to bankruptcy.

the middle portion of the chapter, beginning at p. 40. This statute relates to goods and not to real estate. It was made for the express purpose of obviating the inconvenience arising from the delusive credit acquired by the mortgagor in retaining the possession of the mortgaged article, specifically aiming at and defining that species of fraud. It is also restricted to mortgagors who become bankrupts, and is only available by the commissioners or assignees under a commission of bankrupt. And to bring a case within this statute the mortgagor must have been a trader while he was in possession of the property. *Gordon v. East India Company*, 7 T. R. 229. The division then of the learned author is, *first*, the consideration of fraud with respect to things personal; and, *second*, the consideration of fraud with respect to things real. Under the first head is very properly classed the first and third of these statutes, and under the second head the second of these statutes.

marks of fraud, one reason assigned was (e), "because the donor continued in the possession, and used them as his own, and by reason thereof, he traded and trafficked with others, and deceived them."

A possession of a mortgagee (who is joint-tenant of goods mortgaged with the mortgagor) *per my et per tout*, is not such a possession as will remove the presumption of fraud, if the mortgagor continue to exercise acts of ownership upon the things mortgaged. Therefore, if there be two partners in trade (f), and one of them take a mortgage of the utensils, stock in trade, debts, profits, &c. for securing a sum of money lent by him to the other; and, notwithstanding, suffer him to continue in possession of the partnership deed, stock in trade, and utensils, and to alter and dispose of the goods, and receive the debts as before, such mortgage will be fraudulent in respect to third persons: for, although the mortgagee's being seized *per my et per tout*, will remove the necessity of an actual delivery; yet the mortgagor, being permitted to act after parting with all the interest, till redemption, renders the contract fraudulent, as otherwise a door would be open to fraud, by a partner being permitted to retain all the badges of ownership, to deceive the rest of the world.

Possession by co-partner after pawn to his companion, a fraud,

[22]

And the conclusion of law would be the same, if the mortgage were made to a third person; for in such case the mortgagee ought to be admitted partner for a moiety (c 2).

Though pawn made to third person.

But if on a mortgage of goods (g) the mortgagor agreed to deliver them, and afterwards did not deliver them at the time

Possession not fraudulent, when.

(e) Pr. Ch. 286, 287.

(f) Vide *Ryall v. Rowles*, 1 Ves. 348.

(g) *West v. Skip*, 1 Ves. 240.

(C 2) A pledge by one partner of partnership property will bind his copartners although the pledge be made without his privity, provided the pledgee had no notice that the property was joint property, and there be no fraud in the transaction; for a pledge by a partner does not resemble a pledge by a factor, the latter has merely power, the former has both power and property, and is to be considered as possessed of the entirety of the article pledged. *Raba v. Ryland*, 1 Gow, 132. 134.

Partners.

appointed, but on trover against him, kept the vendee at arm's length, this would not be considered, as a leaving the goods by the mortgagee in the possession of the mortgagor, the mortgagee having done every thing in his power to get the possession from him (D).

*Delivery of key
sufficient.*

So if a mortgage were made of goods, which were agreed to be delivered into the parties' own hands (*h*), or the key of the warehouse agreed to be given up (which in bulky goods is all that can be done), but no such delivery was made, and detainee was brought for them, they would not be considered as left in the possession of the mortgagor, the pursuit in a court of justice excluding any actual or presumed consent.

[23]

But, as has before been observed, the delivery of personal things admits of several modifications, in respect of such things being in possession or in action, present or remote; which circumstances furnish exceptions to the general rule, by occasioning the substitution of other circumstances, in lieu of the actual delivery of possession to which we have above alluded.

*Choses in ac-
tion (E) may be
mortgaged.*

If personal things are in the visible possession of the vendor, and sold by him to another, if the vendee would have the contract to be clear of the imputation of fraud, actual delivery

(*h*) *West v. Skip*, 1 Ves. 240. [and post, p. 31.—Ed.]

*Possession not
fraudulent,
when.*

(D) Hence, therefore, possession alone is not a sufficient ground of fraud to subject the property of one person to the debts of another. There must be proof of the consent of the real owner to leave the goods in the power and disposition of the apparent owner, or a laches in letting them remain there for the purpose of giving the ostensible possessor a false and delusive credit with the world. See post, p. 31. On this principle, if a partnership be determined by effluxion of time, and one partner intends to continue the trade, and the other will not, insisting on a division; and, on non-compliance, brings an action at law, or a bill in equity, for an account and to restrain the disposing of those goods, the possession of which is wrongfully kept from him by his partner, who, pending this, becomes bankrupt, this will not be a fraudulent possession within the statute of 21 Jac. 1. c. 19. *West v. Skip*, ubi supra; et vide *Belchier v. Parsons*, 1 Hanm. Rep. 51.

(E) i. e. Things reducible into possession only by action or suit at law.

ought to be instantly made, unless, in the nature of the contract, something intervenes to delay or prevent such delivery. But personal things *in action* do not admit of any visible possession or actual delivery, the vendor being himself, in such cases, possessed only of a right. The law, therefore, in that case, is satisfied with every thing being done towards a delivery, which the nature of the thing admits; *ex. gratia*, delivery of all the documents by which the existence of the right can be evinced, accompanied with a transfer of the powers necessary to enforce the right. The simplest case of this kind, is the conditional transfer of a debt on bond, which is only assignable in equity, and not at law. The reason why it is assignable in equity, is, because the assignor can furnish the assignee with all means necessary to reduce it into possession, by delivering the bond into the hands of the assignee to prove the debt, which is the *chase in action*, and by giving him an authority to sue in the obligee's name. On an assignment of a bond, therefore, the delivery of the bond, accompanied with a power to sue, is equivalent, in equity, to an actual delivery on the conveyance of goods in possession at law; for all that the nature of the thing admits is done, to divest the right out of the assignor, and vest it in the assignee. But if the bond be detained by the assignor, the assignee will be liable to the imputation of fraud; because then the debt, by the assignor continuing to hold the evidence of it in his hand, remains in his disposition, and he may assign it over to other persons, which is the mischief the statute of the 13th Eliz. of which we are now speaking, was intended to remedy (F).

(F) It is laid down in the old books, that, for avoiding maintenance, a *chase in action* cannot be assigned or granted over to another. Co. Litt. 214 a. 266 a. 2 Roll. 45 b. 46. 10 Co. 48 a. The good sense of that rule seems to be very questionable; and in early as well as modern times, it has been so explained away, that it now remains merely an objection to the form of the action in any case. In 2 Roll. Abr. 45 and 46, it is admitted that an obligation may be granted; but it is said, that the grantee cannot sue for it in his own name. But if a third person be permitted to acquire a right to a thing, then, whether he is to bring the action in his own name, or in the name of the grantor, does not appear to affect the question of maintenance. The case of the crown, however, was always an exception to this doctrine of maintenance; for courts of law not feeling themselves bold enough to tie up the property of the crown, uniformly allowed of assignments of *choses in action* belonging to the crown.

Doctrine of choses in action considered.

Debts in a schedule may be mortgaged.

Upon the same principle debts mentioned in a schedule (2), though not capable of delivery, may likewise be assigned con-

(i) *Unwin v. Oliver*, Cooke's Bank. Laws, 84.

Choses in action.

3 Leon. 198. 2 Cro. 180. Courts of equity, from the earliest times, thought the doctrine which disapproved of the assignment of *choses in action* too absurd for them to adopt, considering that upon principles of natural justice, a man was entitled to receive the thing for which he had paid a valuable consideration; and therefore they always acted in direct opposition to it. Courts of law also have since altered their language on this subject. From the recent cases it may be collected, that although *choses in action* cannot strictly be assigned so as to give a legal title to the assignee, yet they are so far recognized by courts of law that a suit commenced and prosecuted in the name of the assignor will be entertained and decided on in the same way as on any cause of action within the jurisdiction of the court. See *Master v. Miller*, 4 T. R. 340.

Action must be brought in name of assignor.

Hence the action for the recovery of *choses in action* must, notwithstanding the assignment and delivery of the bond or other writing evidencing the right to the mortgagee, be brought in the name of the original obligee, and for that reason a power of attorney to sue in his name should always be inserted in the conditional assignment. Notice also of the assignment, whether it be absolute or conditional, should in all cases be given to the persons liable to pay the money, that they may be bound by the equity of the assignee, and may not protect themselves by a subsequent payment to the assignor. But although at law suits for the recovery of *choses in action* must be commenced and prosecuted in the name of the assignor, yet in equity the assignee may sue in his own name.

Notice, when necessary.

Assignee may sue in equity.

Mortgage of book debts, tolls, corporation bonds, and canal shares.

Book debts and all other sums of money due on contract are *choses in action*, and though assigned with the qualifications mentioned in the next paragraph of the text, must be sued for at law in the name of the original creditor. Sums of money due on turnpike securities are rather in the nature of mortgages than *choses in action*. There is seldom any right to the money except by way of assignment of the tolls, and this is an interest assignable at law. And it should seem that corporation bonds are assignable at law, although they are properly *choses in action*. Shares in canals and navigable rivers are also assignable interests. They are now generally declared to be real estate by the act of parliament for making the canal. The agents, however, to the company will not allow of the register of any instrument varying in form from the one prescribed by the act.

By the Vauxhall Bridge act (49 Geo. 3. c. 142. s. 38.) it is declared, that the proprietors of the undertaking may dispose of any shares to which they may be entitled, and the conveyance of such shares is to be in the form therein mentioned; and that on every such sale the deed or conveyance (being executed by the sellers and purchasers) shall be kept by the purchaser for his security, after the clerk of the company shall have entered in a proper book, to be kept for that purpose, a memorial of such transfer and sale for the use of the company, and have indorsed the entry of such memorial on the said

ditionally; but in such case notice to the persons indebted seems to be indispensably necessary to protect the assignee from the imputation of fraud against third persons, in case of a subsequent assignment; because, unless such notice be given, debts may be again and again assigned, without the possibility of the latter assignees detecting the fraud.

Personal things, in a remote situation, fall under the same principle; these admitting of no actual delivery, they pass by delivering over the means of reducing them into possession, that being the only delivery of which they are capable. Vessels at sea are in this predicament (G); they may be mortgaged

[25 *]
So may vessels
at sea, inf. 34 a.

deed of sale; and that until such memorial shall have been so made and entered, such purchaser shall have no part of the profits, nor any interest for such shares, nor any vote in respect thereof as a proprietor. In drawing a mortgage therefore of this species of property, it is essential to be furnished with a copy of the act of incorporation.

Legacies or sums of money payable out of real or personal estate may be assigned by way of mortgage, either with a proviso, that on payment of the loan, the legacy or sum shall be re-assigned, or they may be assigned in trust that the assignee shall raise the mortgage-money by sale, if the same be not paid on a certain day, and after deducting and detaining thereout his principal and interest, then in trust to pay the surplus to the assignor. The latter is the preferable mode.

Mortgage of
legacies.

Several forms of conditional assignment of *choses in action* will be added in the 3d volume. For more on this subject, see 1 Madd. Ch. 545, 2d edit.

(G) The stat. 26 Geo. 3. c. 60. s. 3. requires all ships, of the burthen of fifteen tons or upwards, to be registered by the person or persons claiming property therein, with the Collector or Comptroller of his Majesty's customs in the port to which such vessels belong, who is to grant a certificate of such registry to the party. This certificate is evidence of property, the same as a charter of feoffment is to real estate. If any assignment or other alteration be made in the property of the ship or vessel, or of the property of any part owner therein, an indorsement must be made to that effect on the certificate of registry, and signed by the person making the same, and a copy be delivered to the registering officer, who is required to make entries of it in his books kept for that purpose, and to give notice of the same to the Commissioners of customs. If these requisites be not complied with, the sale or mortgage of a ship, or of any part or share in the same, will be void, and equity will not relieve. *Bulfeel Ex parte*, 2 Cox, 243. 13 Ves. 588. except perhaps in the case of fraud. 11 Ves. 621. But although the register is conclusive, and at the same time negative evidence, to shew that persons not named in it are not owners, yet it is not affirmative evidence to prove that every person named in it is an owner, unless it be shewn to have been made

[25 *]
Requisites to
mortgage of
ship. [The re-
gistry acts are
now consoli-
dated, infra,
26 b.]

or absolutely sold, and possession transferred by delivery of the muniments respecting them.

by the assent of such person, and to have been recognized by him. *Tinkler v. Walpole*, 14 East, 226. *Frazer v. Hopkins*, 2 Taunt. 5. *M'Iver v. Humble*, 16 East, 169. *Smith v. Fuge*, 3 Campb. 456. *Cooper v. South*, 4 Taunt. 802. *Camden v. Anderson*, 5 T. R. 709. Where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of it, and afterwards as agent for both partners insured the ship and freight, and charged them with the premiums, &c. and on a loss happening, received the money from the under-writers, it was holden by the court of King's Bench, on the ground that an agent cannot dispute the title of his principal, that B. was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon v. Hamond*, 2 Barn. & Ald. 310. Et vide *Prouting v. Hamond*, Gow. Rep. 41. S. C. 8 Taunt. 688. It is further observable, that a deed of defeasance making void an absolute bill of sale, upon payment of a certain sum of money, is admissible for the defendants to shew the purposes of their ownership, though the bill of sale be entered on the registry without mention of the defeasance. *Cor v. Reed*, 1 Ry. & Moo. 199. As to the sale of a share of a ship being good without delivery, see *Addis v. Baker*, 1 Anstr. 222. *Stadgroom Ex parte*, 1 Ves. jun. 163. *Bloxam v. Hubbard*, 1 Smith. Rep. 487; and further, *Moss v. Mills*, 2 Smith. Rep. 227.

Bill of sale of ship at sea.

The certificate of registry is always supposed to be with the ship, and therefore when the ship is at sea a bill of sale is substituted for the indorsement on the certificate, delivery of which is esteemed equivalent to the delivery of the ship itself. 2 T. R. 462. Post, 34 a. Of this bill of sale the same entries are to be made by the custom-house officers as of the indorsement on the certificate of registry, and within ten days after the vessel returns to her port, the regular indorsements must be made on the certificate, otherwise the sales or mortgages effected by the bill of sale will be void. 54 Geo. 3. c. 68. s. 15, 16. *Hubbard v. Johnstone*, 3 Taunt. 177. 5 East, 407. 4 Ib. 110. 8 Ib. 511. The property of a ship vests in the purchaser or mortgagee instantly on the execution of the bill of sale, and not from the time of compliance with the register acts, defeasible nevertheless on failure to comply with those acts. Per Wood, B. 3 Taunt. 177. et vide *Dixon v. Ewart*, 3 Meriv. 322. If a bankruptcy intervene between the transfer by the bill of sale, and the arrival of the ship, the bankrupt may still make the indorsement, as it is only an act of duty, and passes no interest. So if there be a power of attorney to perform this act of duty, the attorney may carry it into effect, although the bankruptcy occur immediately after the power of attorney is given. 3 Meriv. 334. 1 Buck. B. C. 95; and note, an improper indorsement may be prevented by injunction. *Thompson v. Smith*, 1 Madd. Rep. 395.

Equitable lien.

Here by the way observe, that the deposit of documents of a vessel at sea will not, like the deposit of title deeds to an estate, confer on the holder an equitable lien; for the registry acts not having been complied with, no pro-

Upon this principle, the property of goods at sea is held by the possession of the bill of lading (*k*). A bill of lading is an *Mortgage of goods at sea by delivery of bill of lading.*

(*k*) *Evans v. Martlett*, 1 *Ld. Raym.* 2050. *Caldwell v. Ball*, 1 *T. Rep.* 211. *Wright v. Campbell*, 4 *Burr*, 215.

erty passes to the equitable mortgagee. *Taylor v. Kinlock*, 2 *Rose. Ca. Bank.* 474. *S. C.* 1 *Stark.* 175. So of an executory agreement to transfer a share in a ship without such recital, *Biddel v. Leedes*, 1 *Barn. & Cress.* 327; and the late registry act, *infra*, is still further confirmatory of this position. Where a factor for the owner of a ship at an English port, requested the master to deliver the certificate of registry to him, in order that he might pay the tonnage duties at the custom-house, it was held, that the factor having thus obtained the certificate, could not retain it as a security for the general balance due to him as a factor in respect of the ship. *Burn v. Brown*, 2 *Stark.* 272. That a factor cannot mortgage, see *infra*, 28 *a*.

In all transfers of this species of property by way of mortgage or otherwise, the certificate of registry must be recited by the express requisition of the 17th sect. of the stat. 26 *Geo. 3.* c. 60. 3 *T. R.* 406. And a bill of sale, without such recital, has been held an absolute nullity. *Westerdell v. Dale*, 7 *T. R.* 306. So an agreement for a sale of an interest in a ship must recite the certificate of registry or it will not be available in equity. *Brewster v. Clarke*, 7 *Meriv.* 75. But the indorsement need not be recited. 1 *Bos. & Pul.* 483. A similar recital is required by the late act at the foot of this note. But although a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, yet the mortgagor may be sued on his personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison v. Cole*, 8 *East*, 251. And note, a clerical mistake will not vitiate the transaction. *Rolleston v. Smith*, 4 *T. R.* 161. *Certificate must be recited.*

To come more immediately to the subject of the chapter, and to the fictitious credit of which it treats. In the case of *Hay v. Monkhouse*, 1 *Holt's Rep.* 602, it was made a question whether a compliance with the registry acts alone, without any act of possession, would be sufficient to transfer the property in the ship as against creditors, the party transferring the right to the possession continuing to act as owner, and becoming a bankrupt. Looking at the decided cases, there can, it is presumed, be little hesitation in deciding this quære in the negative; for if it be necessary on the return of a vessel to its port to take immediate possession, (*Mair v. Glenale*, 4 *Manl. & Selw.* 249), it certainly must be incumbent on the vendee or mortgagee to exercise that act of ownership, if the ship be laying in the river or in the dock. Indeed, such has been in effect decided by the cases of *Stephens v. Sole*, and *Matthews Ex parte*, cited by the author in pages 50, 31, as also by the authorities presently noticed. The cases which have been decided on the statute of Elizabeth and the statute of James are very similar. They are, in fact, blended together in the case of bankruptcy. The introduction therefore of the cases on the latter statute in this place, so far as they relate to ostensible possessions of ships and shipping, will not be irregular. *Possession of ship after pledge, a fraud. [Contra now, see infra.]*

acknowledgment, under the hands of the captain, that he has

Absolute bill of sale with parol agreement for redemption.

Where A. and B. owners of a ship executed an absolute bill of sale to C. and D. for a nominal consideration, but with a bye parol agreement that C. and D. should accept bills for the accommodation of A. and B. the bill of sale being intended as a security for any advances they may make on such acceptances, and the ship was registered in the names of C. and D.; but A. and B. remained in the management and possession of her, and appeared to the world as owners, and obtained credit from that appearance; and before default made by A. and B. in providing for the acceptances, C. and D. became bankrupts, and their assignees immediately seized and sold the ship, and afterwards A. and B. became bankrupts. It was held, that the assignees of A. and B. could not maintain trover for the ship against the assignees of C. and D., for the statute of James applied only where the order and disposition remain with the bankrupt up to the time of the bankruptcy, and the omission to take possession immediately after the execution of a deed, was not fraudulent under the statute of Elizabeth, if the rights of third persons did not intervene, and in the case in question they did not intervene; for the bankruptcy of A. and B. did not occur till long after the assignees of C. and D. had taken possession of the ship; and it was said by Lord C. J. Abbott, that it was not competent for A. and B. to avail themselves of the parol agreement in contradiction to their own deed; that the bill of sale might be void upon the statute of Elizabeth, against creditors, but not as against the parties who executed it, and that their assignees could not in that respect be in a better situation. *Robinson v. M'Donnell*, 2 Barn. & Ald. 134. S. C. Selw. N. P. 1142. In a still later case the same point came before the court, and it was distinctly decided, that the statute of James was not repealed as to shipping by the ship register acts; and therefore that where A. the owner of a ship, duly assigned his interest to B. and B. became the registered owner, but by his permission A. continued to have the same in his possession, order, and disposition, until he became a bankrupt, the property in the ship passed to A.'s assignees. *Hay v. Fairbairn*, 2 Barn. & Ald. 193. S. C. *nom. Monkhouse v. Hay*, in error, and confirmed, 2 Brod. & Bing. 114. 8 Price, 256; and see further, 2 Barn. & Ald. 248, and 6 Dow's Par. Ca. 135, as to mortgages of ships under the Hawkesbury acts. *Kirkley v. Hodgson*, 1 Barn. & Cress. 596. *Woods v. Russel*, 5 Barn. & Ald. 942. See also 7 T. R. 513. 1 H. Bl. 114. 1 Rose's Bank. Ca. 447, *infra*, [31] [183] and notes there, for liability of mortgagee to repairs and necessities, and for the subject in general, see Selw. N. P. 1169. 5th edition. *Abbott's Law of Shipping*; *Lawes on Charter Parties*.

Stat. of Jac. not repealed by register acts.

Since the last edition of this work, all the ship registry acts have been repealed, and their various provisions consolidated into one act, which however has not superseded the necessity of a reference to the above cases; but those cases, as also the further late decisions cited *infra*, p. 31 a, n. and [1073], must of course be read in connection with the alteration effected by that act, the chief of which alterations regard the reputed ownership of the mortgagor, and the liability of the mortgagee to repairs.

Last ship registry act.

" 4 Geo. 4. cap. 41. "An act for the registering of Vessels." 27th June, 1823."

The first section repeals eleven other acts. The second declares that no

received such goods, which he undertakes to deliver to the

vessel having a deck, or being of fifteen tons burthen, shall enjoy the privileges of a British ship, until registered in some port of his Majesty's dominions, and until a certificate of such registry shall have been obtained, signed by the collector and comptroller of his Majesty's customs in the port where such ship shall be registered, a copy of which certificate is to be transmitted to the Commissioners of customs. Section 29 enacts, that when the property in any ship or share thereof shall be sold after registry, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry, but no error in such recital shall vitiate the sale, provided the identity of the ship be effectually proved thereby. By section 35, bills of sale are declared invalid, until produced to the collector and comptroller of the port to which the ship belongs, and until an entry of such transfer be made in the registry book kept for that purpose; which entry is required to contain the name, residence, and description of the vendor or mortgagor, and of the vendee or mortgagee, the date of the bill of sale, and a minute of the production of it. An indorsement of such entry is then to be made on the bill of sale, signed by the collector and comptroller, and from the date of that indorsement the purchaser or mortgagee acquires priority.

Sec. 37.

Section 43 enacts, that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case, the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry of the book of registry, and also in the indorsement on the certificate of registry, in manner thereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him, her, or them, as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made.

Of transfer by way of mortgage.

Mortgagor to be deemed owner, and not mortgagee.

And it is further enacted, by sec. 44, that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered, according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been

Registered mortgage not affected by bankruptcy of mortgagor, though he be reputed owner.

[27 *]

person named therein (H). It is assignable in its nature, and by delivery and indorsement, with a view to a mortgage or sale, the legal interest in the property is immediately transferred from the owner to the assignee of the consignee; and therefore, if goods consigned to A. generally, are, *bonâ fide*, sold or mortgaged by him whilst at sea, and the bill of lading is indorsed and delivered to the purchaser or mortgagee, together with the bill of sale, the vendee or mortgagee shall hold them by virtue of the bill of sale, though no actual possession be delivered (I).

so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid; but that such mortgage or other assignment shall take place of and be preferred to any right, claim, or interest, which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

This subject is further discussed, *infra*, vol. ii. p. [1073], and appropriate precedents are introduced in the third volume.

Bill of lading.

(H) A bill of lading is rather a memorandum signed by the master of the ship, acknowledging the receipt of the goods of a merchant, who has shipped them for delivery to his agent or correspondent in a foreign port. The merchant is called the consignor, and the agent the consignee. Of the bill of lading there are usually three parts; one kept by the consignor; another sent to the consignee by a different conveyance from that of the ship which contains the goods; and a third deposited with the captain of the vessel.

[27 *]
*Bill of lading
 and bill of sale
 distinguished.*

(I) The bill of lading is the instrument which confers on the vendee or mortgagee a right to hold the goods, and not the bill of sale, which appears to relate more to a mortgage of the ship than to a pledge of the goods which it contains. The ship, however, with its tackle and furniture, is sometimes pledged by the master for the delivery of the articles enumerated in the bill of lading in good condition at the place of discharge. In which case a bill of sale of the ship is delivered to the consignor, as well as the bill of lading.

*Illustration of
 subject.*

By way of illustration it may be useful to observe, that it frequently occurs that a cargo of goods is consigned by a merchant abroad to a merchant in London, and the moment they are shipped, the former draws on the latter to the value of that cargo, and by the first post or ship he sends his advice, and incloses the bill of lading. The drafts and bill of lading in most cases arrive before the cargo, and then the merchant in London must resolve what part he will take. If he accept the drafts, he will become absolutely and unconditionally liable; if he refuse them, he will disgrace his correspondent and lose his custom; yet to engage in the transaction, and render himself responsible, without any security from the drawer of the notes, would be a

And as between the owner or vendor of goods so circum- *Bill of lading transfers absolute property.*
 stanced, and the assignee of the consignee, or vendee, where
 the transaction is *bonâ fide* (1), the bill of lading transfers the

(1) *Lichbarrow v. Mason et al.* 2 T. R. see *D'Aquila v. Lambert*, 3 Eden, 75.
 63. *Lempriere v. Pasley*, 2 T. R. 485. —Ed.]
 [As to consignees becoming insolvent,

bold measure. The goods may be lost at sea, and then he will be left to recover his money of the merchant abroad, as and when he may. The question then with the London merchant is, how can I secure myself at all events? The answer is, I will insure, and then if the goods come safe I shall be repaid out of them, or if they be lost, I shall be repaid by the underwriters on the policy of insurance; but this cannot be effected unless the property be vested in him by the bill of lading; for otherwise his policy will be void for want of interest, and an insurance in the name of the foreign merchant would not answer the purpose.

Having then the bill of lading and the policy, he has a good security for the money lender, inasmuch as both the bill of lading and the policy may be assigned either absolutely or by way of mortgage. If it were otherwise; if the bill of lading did not transfer an irrevocable and uncountermandable right to receive the goods, no man would be safe in either buying or lending money upon goods at sea. That species of property would be locked up, and many a man who could support himself with honour and credit, if he could dispose of such property, would receive a check which all his future industry, caution, and attention, might perhaps never again surmount. Hence the doctrine of the text has many arguments of policy and convenience to recommend it; for, in all mercantile transactions, one great point to be kept uniformly in view, is to make the circulation and negotiation of property, as quick, as easy, and as certain as possible. See the learned Judge's judgment at length, 6 East, 21; and Park on Insurance, *voc.* Bill of Lading. *Reasons for allowing mortgage of goods at sea.*

It is further observable, that a pledge of the bill of lading by which goods are deliverable on payment of freight, by the owner or part owner of the vessel, is also a pledge of the freight. *Hogg v. Graham*, 4 Taunt. 135. And where A. and B., merchants at Liverpool, wishing to draw on C. and D. bankers and merchants in London, agreed to consign to them, as a collateral security, hemp and iron, to the amount of 10,000*l.* on sale for their account, and afterwards sent to them the invoice and bill of lading indorsed in blank, but the ship was prevented leaving Liverpool by an embargo, and while the ship was lying at Liverpool, A. and B. became bankrupts; it was held, that the goods belonged to C. and D. and not to the assignees in bankruptcy of A. and B.; for the moment the goods were put on board, and the bill of lading indorsed and remitted to C. and D., the property was changed, and was to remain in their hands, clothed with the trusts expressed in the agreement. *Haillie v. Smith*, 1 Bos. & Pul. 503. So if a mortgagee of a cargo actually take possession of the cargo, but leave the bill of lading with the mortgagor, a *bonâ fide* indorsee of the bill of lading, though subsequent to the mortgage, might oust the title of the mortgagee. *Nathan v. Giles*, 5 Taunt. 558, 564, 574, 575. S. C. 1 Mar. 226. *Indorsement of bill of lading.*

were merely an assignment and delivery of the bills of lading,

to bill of lading.

absolute property of the goods in the consignee (although it may have been indorsed to another, 1 Marsh. 323); but that when the consignee is the agent or factor of the consignor, the bill of lading does not then vest the right to the goods in the consignee; for he neither pays nor is liable to pay a *bonâ fide* consideration for the same. See *Cass v. Harden*, 4 East, 211. The shipping note of goods at sea does not amount to a bill of lading. A bill of lading is exactly like a bill of exchange, and the property it refers to passes by indorsement on it, but not by delivery of it without indorsement. A shipping note, from the nature of it, is not indorseable. It effects no change of property; and therefore where a consignee of goods, delivered over to a third person, the shipping note of such goods, and a delivery-order on the wharfinger to deliver such goods as soon as they arrived, it was held, that these acts did not pass the property in the goods so as to prevent a stoppage in transitu by the consignor. *Alkerman v. Humphrey*, 1 Carr. & Pay. 58. The same may be said of a delivery-order for wine lying in the London Docks. *Bentall v. Burn*, 1 Ry. & Moo. 107, et infra, [47].

As to agent pledging goods of his principal.

Now that we are on the subject of principal and agent, it may not be out of order to remark further, that as to the shew of credit which the principal enables the agent to hold out to the world, the principal would not lose his right to the goods in his agent's hands, although the principal be in some measure accessory, by means of the false credit, to the fraud committed by his agent. If, therefore, a factor pledge the goods of his principal for his own private debt, the latter may recover the value of them in trover against the pawnee on tendering to the factor what is due to him without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604. *McCombie v. Davies*, 7 East, 5. On the same principle if goods are delivered to a bailee on a contract of sale and return, the bailee has no authority to pledge the goods. *Delaney v. Baker*, 2 Stark. 539. This rule, however, does not apply to the case of a banker, or, as it should seem, to any other person, pledging indorsed bills of exchange deposited in his hands by a customer. Per Eyre, C. J. in *Collins v. Martin*, 1 Bos. & Pul. 651. If a factor places goods in the hands of a broker as security for an advance to himself, and with directions to sell, and the goods are sold before any revocation of these directions, the principal cannot maintain trover against the broker. *Stierneld v. Holden*, 1 Ry. & Moo. 219. So in *Gorgier v. Merville*, 3 Barn. & Cress. 45. it was held, that an agent in whose hands a negotiable security, such as a bill of exchange, a bond of a foreign prince payable to bearer, or a bank note, is placed for a special purpose, might confer a good title by pledging it to a person who did not know that the party pledging was not the real owner. 3 Barn. & Cress. 45.

Bankruptcy of agent.

The clause in the statute of 21 Jas. 1. c. 19. "That all the goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors," relates to goods which he has in his own right only. *Marsh Ex parte*, 1 Atk. 159. And therefore where goods were consigned to a factor, and remained with him in specie up to the time of his bankruptcy, they were held to belong to the principal, and not to the assignees of the factor. *Dumas*

without an indorsement of them, and direction to deliver them to the assignee, of which the case of *Brown v. Heathcote* (m) furnishes an example), it seems that the original owner could not defeat the assignee, although he should intercept the goods *in transitu*; because, in such case, both parties would stand merely upon equitable claims (n), and then he ought to have them, who has the superior equity; and the assignee, whose equity is a *specific* lien upon the things, derived under the assignment, seems, to me, to possess that character.—*Sed quare* (L).

But, if the assignee of the vendee, or consignee (o), take them with notice that they are not paid for, so that the transaction is a fraud between the vendee or consignee, and the assignee, to cheat the real owner of his goods, such assignee will then stand in the place of his assignor, and be effected with the same equity (m).

[30 *]

Notice that goods are not paid for.

(m) 1 Atk. 188.

(n) 3 Atk. 295.

(o) Vid. *Salomons v. Nissen*, 2 T. R. 674.

Ex parte, 1 Atk. 231; and it would be the same if the factor had sold the goods and taken notes in payment, the notes would belong to the principal. *Ibid*.

(L) The editor is of opinion with the author that the deposit of a bill of lading, without an actual indorsement, would create a lien on the cargo to the amount of the money advanced, in the same way that a deposit of title-deeds, without an actual conveyance, would create a *specific* lien on the estate. That the consignee's right to stop *in transitu* is an equitable right, adopted nevertheless by courts of law for the purpose of substantial justice, see *Hodgson v. Loy*, 7 T. R. 445. and *Gwynne Ex parte*, 12 Ves. 382. *Sed vide* 1 H. Bl. 265, n. and 3 Bos. & Pal. 44. and that amongst parties standing upon equitable claims, the party having most equity is preferred. See post, [449].

What if no indorsement of bill of lading.

[30 *]

No instance has been found where there has been a deposit merely without an indorsement since that of *Brown v. Heathcote*; and this absence of authority may, perhaps, arise from the practice of indorsing the bills of lading in blank, so that there cannot well be a delivery without an indorsement, and such blank indorsements appear to be sufficient to pass the property when they shall be filled up. 6 East, 21. Per Buller, J. *Salomons v. Nissen*, 2 T. R. 674.

Indorsements in blank.

(M) In the case of *Cuning v. Brown*, 9 East, 505. 515. a similar point arose.—The consignee indorsed and delivered the bill of lading for a valuable consideration to the indorsee, who knew at the time that the consignee had not received money payments for his goods, but had taken the assignee's acceptances, payable at future days, which were not then arrived. But the

Notice.

*Possession of
bill of lading
gives priority,*

And if there be several bills of lading of different imports, that person who first gets possession of one of them, by delivery of the owner, or shipper, or his consignee, by way of security, or as vendee of the goods, will be entitled to the consignment, he having the first legal right (*p*). And if the holders of any other of the bills of lading first get possession, it may be recovered by action of trover;—because bare possession conveys no title, as between persons claiming under different rights; in such cases, therefore, the only question is, who has the legal title? for the person who first obtains a right under the legal title must prevail,

*Mortgage of
vessels on the
river, and pos-
session after by
assignor, a
fraud.*

[31 *]

But such sale would not avail against creditors, or subsequent purchasers with possession delivered, if a vessel, or goods therein, were in a state in which they admitted of being actually delivered (*q*); and, therefore, if one sold hoys or other vessels on the river, redeemable, and the assignor was left in possession, and continued to work them, and exercise acts of ownership on board them; such an assignment would clearly be fraudulent (*N*).

If a ship at sea, after having been sold, were permitted to

(*p*) *Caldwell v. Ball*, 1 T. R. 205. 1 Atk. 170. [1 Ves. 352. ante, p. 24 a,
(*q*) *Vide Stephens v. Sole*, cited note there.—Ed.]

court held, notwithstanding this knowledge, that such assignment of the bill of lading was good, and that the consignor could not stop the goods *in transitu* upon the insolvency of the original consignee; for that the case of *Salomons v. Nissen*, being a case of express fraud, did not afford any principle to govern the case in question in which the absence of fraud was found. The doubt which had been thrown on the subject arose principally from the words ‘without notice,’ to be found in the case of *Salomons v. Nissen*, and other cases. But the court was of opinion, that according to the general scope and meaning of the passages in the opinion of the judges, where that expression occurred, it was not to be understood in the restrained sense contended for, viz. ‘without notice that the goods had not been paid for;’ but ‘without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable:’ and the circumstance of the indorsee’s knowledge that the consignor had not been paid in money, was considered as not being such a circumstance.

[31 *]

(*N*) In *Hall v. Gurney*, Cook. Bank. Laws, 5th ed. 342, Lord Mansfield, Chief Justice said, that in this case of *Stevens v. Sole*, there was a grand bill sale, which was delivered to the mortgagee,

come back, and go on another voyage, it is presumed that would alter the case, and make such sale fraudulent (r) (o).

So, of a ship returned, and permitted to go another voyage.

(r) Vide *Ex parte Matthews*, 2 Ves. 231. 380. 1 Ves. jan. 168. [2 Eden, 272. *Hall v. Gurney*, Cook. B. L. 231.—Ed.]

(O) Where a ship and cargo at sea was conveyed to A. as a security for money borrowed, by executing and delivering to him a bill of sale of the ship, and also a policy of insurance of the ship and cargo, and indorsing the bills of lading, and when the ship returned, notice thereof was given to A.; but he neglected to take possession of the same, or to do any act notifying the transfer of the property to him, it was held, that the ship and cargo did not pass by the bill of sale and indorsement of the bill of lading, but that the assignees of the mortgagor were entitled to the same under 21 Jac. 1. c. 19. post, [40]. It was also in the same case determined, that an agreement between the mortgagor and the captain, that the captain should have one-fifth share of the profit or loss of the voyage, did not prevent A. the mortgagee, from taking possession. *Mair v. Glennie*, 4 Manl. & Selw. 240. See also 7 T. R. 228. Where a ship was mortgaged at sea, with a proviso, that the mortgagor should continue in possession till failure of payment of the mortgage-money, on demand made thereof, and the bill of sale was delivered to the mortgagee, and before the arrival of the ship, the mortgagor became bankrupt. It was held, that the mortgagee who took possession of the ship on her arrival, might maintain trover against the assignees of the mortgagor, who took the ship from him, notwithstanding he did not make any demand of the mortgage-money, either on the bankrupt or his assignees. *Atkinson v. Maling*, 2 T. R. 462; but see *supra*, 26 b.

Mortgagee not taking possession of ship, enables mortgagor to commit a fraud. [Contra *now*, *sup.* 26 b.]

The mortgagee, whether in or out of possession, is the legal owner of the ship, and is so considered in a court of law, notwithstanding his title is subject to equitable interests. It was said by Lord Mansfield, that a mortgagee is only liable to repair the ship when in actual possession. 2 Dong. 454. But in *Westerdell v. Dale*, Lord Kenyon said he doubted this position, 7 T. R. 312; and see post, [185] n. where it should appear that the doubt of my Lord Kenyon is well founded. Where there was an absolute bill of sale of a ship to A. in trust to sell at any time before the re-payment of a certain sum of money, but with a proviso, that on re-payment he should re-convey to the mortgagor. It was held, that under this conveyance, A. was a mortgagee, and not the absolute owner of the ship; and therefore that he was not liable for necessities provided for the ship, before he took possession. *Jackson v. Vernon*, 1 H. Bl. 114.

Mortgagee legal owner, and liable to repair.

What shall be deemed a mortgage.

This case is expressly provided for by the consolidated act, recited p. 26b, ante, but it may not be amiss, as that act does not entirely abrogate the law settled by the prior adjudications, to add, that in Hilary term, previous to the passing of that act, a case occurred, where, under the circumstances, a mortgagor who kept his name on the registry, but who had parted with all his interest in the vessel, was held liable to repairs, although he never afterwards interfered in the management of the ship; Abbott, C. J. considered the register as legal evidence of ownership, and that no private understanding or agreement

Liability of registered owners not varied by private agreement or informal bill of sale.

Key good delivery of bulky goods. *Ante*, p. [22].

The delivery of a key of a warehouse, is a delivery of the goods therein contained, if from their bulk, they admit of no other delivery.

[32 *]
No fraud if delivery cannot be made (P).

And generally, if, in the nature of the transaction, no delivery can be made of goods sold, although the same are present, possession retained seems to be no badge of fraud (s).

Acceptance not necessary to complete gift (Q).

As if one who was considerably indebted, in order to give one of his creditors a preference (t), were to make an assign-

* Parol gift without delivery, void (R).

(s) Vide 1 Ves. 243. 1 Atk. 185. A delivery to one for the use of another without consideration, may be Doug. 303.

(t) Vide *Strange*, 165, delivery to the use of a creditor, good without acceptance. See the case of *Atkin v. Barwick*, Stra. Rep. 165.— actual possession in third person—*contra*, if upon consideration it vests till divested by refusal. * A parol

between the parties, could weaken the effect which that evidence was calculated to have on the world. The object of the registry acts was, that creditors might know who were the proprietors of the ship, and to whom they might look for payment of their claims in respect of such property, which object would be utterly defeated if any private agreement between two joint owners, could vary the responsibility which both had previously acknowledged to the world. *Dowson v. Leake*, Dow. & Ry. N. P. C. 52. But a party who takes a share in a ship, under a conveyance void for want of conformity with the provisions of the registry acts, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner. *Harrington v. Fry*, 2 Bing. 179.

Possession without privity of assignee.

(P) It seems also deducible, from the cases quoted by the learned author, that possession after assignment, without the privity of the assignee, will not be any badge of fraud.

[32 *]

(Q) With deference to the learned author, it is apprehended, that no estate or interest can vest in a person against his will, and therefore that no one can become a grantee or assignee without his agreement. Acquiescence implies assent, till the contrary be shewn; but a person cannot be well said to acquiesce in a right of which he is not conscious. This subject was canvassed by Ventris, Justice, in *Thompson v. Leach*, 2 Vent. 203, to which the learned reader is referred; as also to *Bonifant v. Grenfield*, Cro. Eliz. 80. *Hackins v. Kemp*, 3 East, 410. *Crao v. Dicken*, 4 Ves. 100. *Randall v. Errington*, 10 Ves. 427. Vin. Abr. tit. Disclaimer. *Scurfield v. Howes*, 3 Bro. C. C. 90. Shep. Touch. 318. *Turner v. Richardson*, 7 East, 340. *Copeland v. Stevens*, 1 Barn. & Ald. 596. *Townson v. Tickell*, 3 Ib. 31. 2 Meriv. 362; though 1 Salk. 301, is perhaps *contra*.

What a sufficient delivery.

(R) To prove an act of delivery, the defendant shewed that the intestate, when he went out of town, used to leave the key of his rooms with the de-

ment to him, without the privity of such creditor, of a part of his furniture, or the like, and an execution were immediately afterwards, and before notice given, or possession taken, executed against him, and all his furniture taken, such an assignment would, I presume, be good, and the goods transferred thereby not subject to the subsequent execution; for, an acceptance is not necessary to the transfer of property, the law presuming an assent to accept that which *prima facie* imports a benefit to the acceptor; the use and property in the goods is therefore forthwith divested out of the assignor, and vested in the assignee; and if so, nothing can again revest it in the assignor, unless it be an act of the assignee, which will make the contract fraudulent as to third persons: but the very nature of the transaction, in the instance stated, precludes the possibility of any fraud being practised on his part.

And the same principle would apply, if the object were to secure a future contingent debt, which might or might not arise, according as circumstances turned out.

Contingent debt.

As if a man were to assign goods to his sureties in a recognizance, entered into on his being appointed receiver of a lunatic's estate, that he should account for what he might receive under the orders of the court; it should seem that such assignment would be good against an execution subsequently executed upon them.

Goods assigned to a surety.

[33]

So if an assignment were made under the apprehension of legal duress, that circumstance, it is presumed, would remove the implication of fraud from possession retained; as if a man, confined in a spunging-house for debt, were to assign a part of his goods to a creditor, as a security for the debt, in order

Assignment under duress.

gift, without some act of delivery, parol gift of goods therein, was held will not alter the property; but sufficient, because the law will consider the true owner in possession. delivery of the key of a lodging-room to a landlady, coupled with a

Strange, 955.

defendant, and that was insisted to be such a mixed possession, that the law would adjudge the possession to be in him who had the right. The Chief Justice ruled it so; and the jury found for the defendant. *Smith v. Smith*, 8tra. 955.

to procure his discharge. In such case, the goods being left in the possession of the debtor for a reasonable time after the assignment, and until proper means could be taken to remove them, would not make the assignment fraudulent.

No fraud where appearances agree with real state of things.

Another ground upon which cases have been considered as not within the purview of this statute, is, that by the specific words of the contract, possession was not meant to follow immediately thereupon; for the circumstance which stains the transaction with fraud, is the false appearance held out, when one thing is done, and an appearance permitted which imports the contrary; an absolute unqualified transfer of the right to the vendee, but the possession and use retained by the vendor, with no other object but to defraud. But there can be no fraud where the appearances agree with the real state of things.

Parol evidence admitted to prove this.

And what was the intrinsic nature of the contract, as to the retaining or parting with the possession, may be made out from the deeds, where the transaction is in writing, and where the transaction is in *pais*, by such parol evidence as can be adduced for the purpose of proving it.

Possession by mortgagor entrusted to sell for mortgagee, no presumption of fraud.

The strongest case of the former description, is that of *Bucknal v. Royston* (u). There B. supercargo of a ship which was to go a voyage to the East Indies, having shipped on board goods and commodities, borrowed money on bottomry of A. and at the same time made a bill of sale of the goods and commodities, and of the produce and advantage thereof, to A. in nature of a mortgage, as a security for the money lent. The ship went her voyage, and these goods were sold, and others bought with the money arising by the sale, and those again invested in other goods, and so there had been several barter and exchanges of several sorts of goods. The ship returned, and B. died at sea or in his return home; and it became a question between a judgment creditor of B. who got possession of these goods, and A. which of them should have the property. And one ground urged on the part of the

judgment creditor was, that B.'s keeping possession of the goods after the sale, made it fraudulent and void as to creditors. *Sed per* Cowper, Chancellor, *the trust of these goods appeared upon the very face of the bill of sale*. Though they were sold to A. yet he trusted B. to negotiate and sell them for A.'s advantage; then B.'s keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale (s).

Upon the same principle, where household furniture (v) which had been settled (on the marriage of the owner with a ward of the Court of Chancery, and which settlement was approved by a Master) to the use of the owner for life, remainder to his lady for life, remainder to the first and other sons of the marriage in strict settlement, had been taken in execution by a judgment creditor, for the debt of the first tenant for

Bonâ fide possession no fraud if it be part of trust.

(v) *Cadogan v. Kennet*, Cowp. 432.

(8) But where a party took possession under a bill of sale, yet suffered the vendor to sell the property in the usual way of his trade, this was considered as giving him a false degree of credit, and the possession was adjudged colourable, and the bill of sale void. *Paget v. Perchard*, 1 Esp. Rep. 205. And in a similar case, where the vendor remained in possession without selling, the same judgment was given, notwithstanding a servant of the vendee was in possession also. *Wordall v. Smith*, 1 Campb. 333. In that case Lord Ellenborough said, "There must be a *bonâ fide* exclusive and substantial change of possession under an assignment, or it is fraudulent as against creditors. A concurrent possession with the assignor is colourable. There must be an exclusive possession under the assignment." See also *Benton v. Thornhill*, 1 Marsh. 429. It is, however, observable, that in all cases, an assignment of chattels, or personal interests, will be valid as against the mortgagor himself, and all claiming under him. *Hawes v. Leader*, Cro. Jac. 270. - Shep. Touch. 66. And also against a creditor, with whose privity the conditional assignment may be made, although unaccompanied with possession. *Steel v. Brown*, 1 Taunt. 381. But not against other creditors. *Dutton v. Morrisson*, 17 Ves. 197; and *Hiern v. Mill*, 13 Ib. 122. See also p. 38, post, u. (v). 8 East, 497. 5 T. R. 238. And although the relation of debtor and creditor subsist between the former owner and purchaser of goods, yet if the purchaser become the proprietor of the goods under a regular bill of sale from the sheriff, the goods are protected against a subsequent execution, notwithstanding that after the bill of sale, and until the execution is levied, the former owner be permitted to continue in the possession of them. *Kidd v. Robinson*, 2 Bos. & Pul. 59. *Arundell v. Phipps*, 10 Ves. 139. *Watkins v. Birch*, 4 Taunt. 823.

Vendor suffered to sell property, a fraud.

Possession taken by vendee, must not be joint, but exclusive.

Assignment good against mortgagor and creditor privity to it.

[35]

life; it was insisted, in support of the validity of the transaction, that the settlement itself was a fraud, and the possession by the owner the strongest evidence possible of an intention to deceive creditors. But Lord Mansfield, in giving judgment, at the same time that he admitted that the statute of the 13th Elizabeth could not be too liberally construed, or be too much extended in suppression of fraud, observed, that such construction was not to be made in support of creditors, as would make third persons sufferers. Therefore the statute did not militate against any transaction *bonâ fide*, and where there was no *imagination of fraud*; and so was the common law. The question therefore in every case was, whether the act done was a *bonâ fide* transaction, or whether it was a trick and contrivance to defeat creditors. An argument had been drawn from the possession, as a strong circumstance of fraud; but it did not hold in this case, for it was a part of the trust, that the goods should continue in the house.

Delivery of bill of sale of a ship at sea, equivalent to delivery of the ship itself. See ante, 24 a.

Again, where A. by indenture, bargained and sold a ship at sea, and assigned the grand bill of sale thereof to B. for securing the sum of £2000. already advanced by B. to A. and for securing such farther sums as B. should advance (x), subject to a *proviso*, on condition therein contained, for redemption on payment by A. on demand by B. of the money then advanced, or which should thereafter be advanced, together with lawful interest. This indenture also contained a covenant, that A. should, immediately after the execution of it, cause the ship to be insured, and pay the premium, &c. (y). And it was also thereby agreed, that, until default in payment should be made, it should be lawful for A. to hold the ship, and take the profits for his own use and benefit. It appeared also, that the grand bill of sale was delivered to B. on the execution of the deed. Insurance was afterwards made by A. on the ship, and a memorandum made on the back of the policy, and signed by all the under-writers, that the ship, having been sold to

(x) *Atkinson v. Making et al.* 2 T.R. See *Moss v. Charnock*, 2 East, 302.—462.—[The mortgage deed in this case was executed before the stat. 26 Geo. 3. c. 60. ante, p. 24 a, n. (a).] *Ed.*
(y) As to this, vide *Bamford v. Baron*, 2 T. R. 594, 595.

B. the insurers of the policy did thereby consent and agree, that he should be entitled to the insurance, the ship having become his property. A. having become a bankrupt, a question arose between his assignees and B. which of them should be entitled to this property. And on the behalf of the assignees, it was contended, that this was a fraudulent conveyance, within the statute of the 13th Elizabeth; and one ground urged to support that proposition was, that the conveyance was made for the purpose of securing not only the money which was then advanced, but also all subsequent sums which might be advanced; and that it was in the power of the mortgages, under this security, to continue the possession, and his dealing with the mortgagor down to the time of the bankruptcy. This therefore had a necessary tendency to give a credit, and to defraud creditors who relied on the flourishing appearance of the trader; and an attempt was made to take this case out of the general principle, respecting the delivery of things at sea; upon the ground, that the delivery of the bill of sale, would only be considered as a symbolical delivery of the ship, where it was so intended; but that, in this case, it could not amount to a delivery of the ship itself, because such an implication was expressly rebutted by the terms of the contract, the plaintiff not being entitled to the possession, till after the mortgagor had refused to pay the mortgage money: but it was held, that a delivery of the grand bill of sale was a sufficient transfer of the property to B.

[36]

It is observable upon this case, that the question arose between the conditional vendee and the assignees of the vendor under a statute of bankruptcy, who, as we shall see hereafter, are bound by the same equity as affects the bankrupt himself (T); but I apprehend the case would have been the same, had the dispute arisen between such vendee and a judgment creditor, or any other claimant.

(T) As to this see *Mitford v. Mitford*, 9 Ves. 100. 409. *Robinson v. M'Donnell*, 2 Barn. & Ald. 134.

Possession after assignment for creditors, though by agreement, void.

And this point was ultimately settled in the case of *Bamford v. Baron* (s). There goods were assigned by the owner to two persons for the benefit of such of his creditors as would sign a deed of compromise by a certain time; notice whereof had been published in the county papers. And it was agreed, that the owner should continue in possession for a given time, he accounting for the profits in the mean time to the trustees. He accordingly continued in the visible possession of the goods after the assignment; and the same were taken in execution at the suit of a creditor: and the question was, whether this conveyance was fraudulent, under the circumstances, by virtue of the statute of the 13th Eliz. c. 5, and consequently void.

Possession must accompany and follow the deed, but no presumption of fraud by retention of possession if deed sanction it (x).

[37]

And the opinion of all the judges was taken (a), and they were unanimously of opinion, that it was; and they laid down the following as a general principle, viz. that unless possession accompanied and followed the deed, it was fraudulent and void. That if there were nothing but the absolute conveyance without the possession, that, in point of law, was fraudulent; not only evidence of fraud, but such a circumstance as *per se*

(z) 2 T. R. 594, note; *et vide Ex parte Quincy* (v), 1 Atk. 477.

(a) Ibid.

Agreement that mortgagor may hold the brew-houses, good.

(U) In this case Lord Hardwicke said, the difficulty with him was the possession of the mortgagor; but that was cleared up, it being the express agreement of the parties, that the mortgagor should not be prevented from coming on the brew-house, &c.

As to retention of possession pursuant to the deed.

[37 *]

(X) In confirmation of this doctrine, it was clearly and distinctly laid down as a general rule, in *Edwards v. Harben*, 5 T. R. 587, that in the transfer of chattels, possession must accompany and follow the deed, and consequently that where the assignment or bill of sale is absolute, the possession must be delivered immediately; but where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed. So long ago as the case of *Stone v. Grubham*, 2 Bulst. 218, the court held, that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but that if the deed of conveyance be conditional, there the vendor's continuing in possession will not avoid it, because by the terms of the conveyance, the vendee is not to have the possession until he has performed the condition. And in *Kidd v. Rawlinson*, 2 Bos. & Pul. 59, Lord Eldon, C. J. cites and sanctions the following passage from Bul. N. P. 258:—
“The donor's continuing in possession is not in all cases a mark of fraud, as

where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money."

The general applicability of this doctrine, however, has been doubted, and those doubts have been judicially noticed in the late case of *Steward v. Lombe*, *ubi infra*, and the rule as to mortgages seems now to have taken a different turn, and to depend mainly on the particular circumstances of each case, and the ingredients of fraud which it is found to contain. *Modern rule.*

The latest case on this subject, is that of *Steward v. Lombe*, 1 Brod. & Bing. 506. In that case W. B. mortgaged certain lands to C. D. by a deed, which contained the usual mortgage proviso and mortgage covenants. On some part of the lands stood a windmill, constructed in the usual manner, being an octagonal wooden edifice, raised on a casement of brick-work, and anchored into the ground by spores and land-ties, part of the spores and the whole of the land-ties being one foot under the surface of the earth, but it was stated that the windmill was removable at pleasure. W. B. remained in possession of the premises and of the windmill after the mortgage; and the present was an action on the case against the defendant, as sheriff of the county, for pulling down and taking away the said windmill in the execution of a *fiery facias* against the said W. B. Two questions arose, the first, whether the windmill was a fixture (which it was found not to be by the verdict of a jury)? and the second, whether the windmill, being a chattel, passed to the mortgagee, he not having taken actual possession thereof? The mill was mentioned in the mortgage-deed by name. As to the latter question, Lord Chief Justice Dallas considered it a case in which an actual and separate possession could not have been taken; for whether the mill was legally a fixture or not, it was at all events actually fastened to the land; and it was not to be expected that the mortgagee should come to reside in the mill. The question did not arise on the bankrupt law, nor was it a case in which the appearances of the mortgagee tended to excite a false degree of credit. In conformity with the usual practice, the mortgagor permitted the mortgagee to remain in possession. In the case of *Edwards v. Harben*, the goods were such as passed from hand to hand, and might therefore, without inconvenience, have been transferred into actual possession. In the case before the court, the chattel was of a very different description. The constructive possession therefore of the land under the deed was a sufficient possession of the mill standing on the land, and the more so as it was not an absolute conveyance, but a mere pledge to be kept till the money lent upon the security of it was paid, and the only possession possible in such a case took place; Mr. Justice Park also observed, that it was not necessary to go into the various cases of fixtures as between landlord and tenant, heir and executor, the question before the court was much narrower. Supposing then *Edwards v. Harben* to be law (though doubts had arisen as to the extent of the doctrine there laid down), and possession to be necessary to confer the property in the mill, there had been such possession, as was admitted by the nature of the case, which was very different from the case of goods capable of being transferred from hand to hand; the possession of these by a supposed vendor after sale might be a badge of fraud; but would it not be ridiculous if the mortgagee should be required to come from another part of the country and turn miller, in order to take possession of his security? This was a mortgage of land by a party, who was

Possession of chattels by mortgagor after mortgage no fraud, if from nature of chattel, possession cannot conveniently be had.

made the transaction fraudulent; but, although the vendor continued in the possession, it was not fraudulent, if the want of immediate possession were consistent with the deed. As in the cases of *Bucknal v. Royston*, *Cadogan v. Kennet*, and *Haselington v. Gill* (b) (Y).

(b) *Supra*, [33] 34.

in the actual occupation of a mill, and, if he relinquished his occupation, it would probably defeat all the ends of his mortgage. No false credit had been created by the transaction, and therefore the verdict ought to stand for the mortgagee; and the judgment of the court was given accordingly. See p. [40], n. (z), and next note.

[38*]
Personalty assigned to trustees for wife's separate estate, produce is separate estate, and possession thereof by husband not fraudulent, wife being considered as agent of trustees.

(Y) The case of *Haselington v. Gill*, 3 T.R. 620, has not been previously noticed. It was to the following effect:—Ann Peach, a cowkeeper and milk-seller, being possessed of thirty-two cows and a heifer, assigned the same to certain trustees previous to her marriage: Upon trust to permit the said Ann Peach, or such person as she should by her last will in writing appoint, and, in default of appointment, the administrators of the said Ann Peach to keep and enjoy, and at her or their will to sell and dispose of the said cows, and of all the increase and produce to arise and be produced from the same, for her and their own proper use, without her then intended husband's intermeddling therewith, and without the same or any part thereof being under his controul, or liable to his debts and engagements. The indenture of assignment also contained a covenant from the intended husband, that the said cows, and the increase, benefit, and produce, arising from the same, should at all times thereafter remain and be, to and for the several uses, trusts, and purposes, as before expressed; and that he would permit Ann Peach to carry on the trade and business of a cowkeeper and milkseller, according to her own will and pleasure, and at such place and places as she should from time to time think proper for her own sole use and benefit. The marriage was solemnized after the execution of the settlement. The defendants, as sheriff of Middlesex, levied an execution at the suit of Henry M'Cleish, against the goods of the husband, and seized and (after having notice of the settlement) sold eight cows and one heifer, four of which were part of the cattle belonging to Ann Peach before her marriage, and mentioned in the deed of settlement, and the rest of them bought with the money produced by the sale of milk of the cows mentioned in the settlement. The wife was then living.

The court were of opinion, that the possession alone of the wife did not make the transaction fraudulent. For it was consistent with the deed of settlement, and that gave the trustees as much interest in the produce as in the original property. There was no circumstance to shew a fraud as to the first cows, and as to the produce it was the same as if the wife had paid the money over to the trustees, and they had bought the other cows; for she acted as their agent.

In another case, A. assigned his effects to trustees for the benefit of his creditors. By the deed the trustees were authorized to allow A. to remain in possession of any part of them until the remainder should be sold and the debts collected. They sold a part of the goods by public sale, describing

As to the instances in which the nature of the transaction has been permitted to be made out by parol evidence, they are more rare, but stand nevertheless upon authority not less respectable. The first instance I have met with is, a resolution in the case of *Cole v. Davies* (c); that if goods belonging to

Parol evidence admitted to prove possession by mortgagor, consistent with deed.

(c) 1 Ld. Raym. 724.

them as his property, and suffered him to remain in possession of the remainder, on the security of which B. knowing them to be the property of the trustee, gave credit to A. Execution afterwards issued at the suit of B. and the goods were sold under a *fieri facias*. It was holden that the trustees might recover against the sheriff in an action of trespass—B. having had notice of the change of property, and the possession of A. being consistent with the deed. *Wooderman v. Baldock*, 8 Taunt. 676.

P. 38
continued.

Hence the principle to be deduced from the decided cases on this subject, is, that although continuing in possession must, generally speaking, be considered as a badge of fraud, yet the presumption of fraud arising from that circumstance may be repelled, by giving a reasonable account for the retention of the possession, and shewing that no actual fraud or sinister motive was contemplated or imagined by the parties at the time the transaction took place, for the purpose of defeating other creditors or third persons of their just claims. The rule in short is, that the want of possession in the case of an absolute assignment, is not such a circumstance *per se* as makes the transaction fraudulent; it is only indicative of fraud, and therefore a question for the jury to decide. See the last note, et ante, [22]; also *Hoffman v. Pitt*, 5 Esp. N. P. C. 25. *Reed v. Blades*, 5 Taunt. 212. In these cases the notoriety of the change of possession is the question to be ascertained. Generally speaking, the possession must be immediate, that is, it must accompany and follow the deed. Where, however, the deed is not an absolute, but only a conditional assignment, the assignor may remain in possession until the condition be performed; but if the condition be not performed, the possession becomes absolute, and should be taken. *Armstrong v. Baldock*, 1 Gow, 35.

Principle deduced from decided cases.

For further on the subject of this statute of the 13th Eliz. see *Kidd v. Rawlinson*, 2 Bos. & Pul. 59. *Watkins v. Birch*, 4 Taunt. 823. *Joseph v. Ingram*, 8 Taunt. 838. S. C. 1 J. B. Moore, 189; as to debtor's continuation of possession after execution against him, by permission of creditor suing the execution, and purchasing the goods at the sale by the sheriff. And *Leonard v. Baker*, 1 Maul. & Selw. 251, as to continuation of possession by debtor, after assignment for benefit of creditors, by permission of the son of the debtor, who bought the goods for valuable consideration, at a sale by auction. And *Dewey v. Boynton*, 6 East, 257. *Cross v. Glode*, 2 Esp. 578; and *Arundell v. Phipps*, 10 Ves. 145, as to husband's possession of his wife's separate estate, in addition to *Heslington v. Gill*, ubi supra. And as to assignments for the benefit of creditors under the first section of the act of 13 Eliz. c. 5, see *Eckhardt v. Wilson*, 8 T. R. 140. *Pickstock v. Lyster*, 3 Maul. & Selw. 371. *Rex v. Watson*, 3 Price, 6. See also *Woodham v. Baldock*, 3 J. B. Moore, 11. S. C. 1 Gow, 35.

Other cases referred to.

A. were seized upon a *fieri facias*, and sold to B. *bond fide* upon valuable consideration, though B. permitted A. to have the goods in his possession, upon condition that A. should pay to B. the money, as he should raise it by sale of the goods; this would not make the execution fraudulent. [And in such case a subsequent act of bankruptcy by A. would not defeat the sale.—*Ed.*]

And where a tenant, having changed his trade from that of a victualler to the trade of an innkeeper, and, having occasion for more furniture, borrowed money of his landlord to buy goods to furnish his house; and, for security of the money, made a sale of the goods to his landlord, but kept the possession of them: it was held by Holt, Chief Justice (*d*), that although, if these goods had been assigned to any other creditor, the keeping the possession of them had made the bill of sale fraudulent as to the other creditors; yet, since such was the original agreement, and that honestly and really made for securing the money of the landlord, which he had lent to the tenant for this purpose, the agreement was good and honest.

Possession of things fixed to the freehold, no fraud.

If personal things be fixed to the freehold, they will be considered in law as part of it, while they continue in that state.

Utensils in a brewery.

Thus, where a brewer having borrowed money, as a security, conveyed and assigned his dwelling-house and brew-house, and all the coppers and utensils in trade belonging thereto, by way of mortgage, subject to redemption, and afterwards continued in possession (*e*), it was held, on a question between the first mortgagee and the subsequent mortgagees and creditors, as to the validity of the first mortgage, which was disputed upon the ground of its being fraudulent, by reason of the possession being retained by the mortgagor; that the first mortgagee had a lien upon the utensils fixed, no person having a title to remove them until the mortgage was satisfied. And it was compared to trees on lands leased, which neither the lessor

(*d*) *Meggott v. Mills*, 1 Ld. Raym. 286.

(*e*) *Ryall v. Rolfe*, 1 Atk. 165. 1 Ves. 348. Et vide *Ex parte Quincy*, 1 Atk. 477.

nor any other person can cut down during the term leased; because they are considered as part of the lease not excepted thereout. And if it were otherwise, great inconvenience would follow; as the lessor of a brew-house, or of any manufactory, with his own fixtures, would be liable to be stripped of them, to satisfy the debts of the lessee (z).

[40]

We come now to the consideration of the statute of the 21st James the First (f).

That statute, section eleven, the preamble of which section is by mistake connected with the latter part of section ten, and is in these words (A): "For that it often falls out that many persons, before they become bankrupts, do convey *their goods* to other men upon good consideration, yet still do keep *the same*, and are reputed the owners thereof (B), and dis-

21 Jac. 1. c. 19,
s. 10, 11.

(f) 21 Jac. 1. c. 19. [s. 10, 11.—Ed.]

(Z) In the case of *Reid v. Blades*, 5 Taunt. 212, it was held, that a conveyance of chattels, unaccompanied with possession, was void, although the assignment was in the same instrument which contained a valid mortgage of leasehold buildings, in which the chattels were situated. The chattels consisted of the scenes, decorations, and dresses, of the Italian Opera House, and circumstances of fraud were apparent. The late case of *Steward v. Lombe*, supra, p. 36 a, n. (x) is in point. The rule to be deduced from that case is, that if the mortgagor retain the possession of chattels which are transferrable from hand to hand, it will be a fraud *prima facie*; but if he retain the possession of personal chattels which savour of the realty, no presumption of fraud will arise from that circumstance. A windmill, a brewer's still, and the vat of a soap-boiler, are chattels of the latter description. So the engines, machinery, and effects used in a colliery are of the same character, and the tenant's possession of them as part of the property demised, cannot be held a delusive possession, when it may easily be inquired whether the tenant took the naked colliery, or whether he took it furnished with these articles. *Storer v. Hunter*, 3 Barn. & Cress. 378. So of a furnished house or lodging, infra, 43, n.

Of what kind
of chattels
mortgagor may
retain posses-
sion without its
being a fraud.

(A) Lord Hardwicke was of opinion, that the preamble of this statute restrained the enacting part of the section quoted in the text; but it was decided in *Mace v. Cadell*, Cowp. 232. that it did not. See also *Coxe v. Listard*, 2 Park. Insur. 645.

(B) Reputed ownership, and its consequent false credit, are the mischiefs to which this section of the statute is chiefly directed. The principal object, therefore, is to inquire, whether the bankrupt be reputed owner or not, and then the application of the statute will be clear and easy. To facilitate this

[41]

“ *pose (c) of the same as their own (g)* ; it is enacted, that, if
 “ at any time thereafter, any person or persons shall become
 “ bankrupt, and at such time as they shall so become bank-
 “ rupt shall, by consent and permission of *the true owner* and
 “ proprietary, have in *their possession, order, and disposition*,
 “ any goods or chattels (d), whereof they shall be reputed
 “ owners, and take upon them the sale, alteration, and dispo-

(g) Vide *West v. Skip*, 1 Ves. 240. 244. Several cases out of this stat.

inquiry, it has been decided, that parol evidence will be admitted to prove the reputed ownership, when supported by numerous facts, but as it should seem not otherwise. *Oliver v. Bartlett*, 1 Brod. & Bing. 269.

(C) This word includes dispositions as well absolutely as by way of mortgage. *Ryall v. Rolle*, ubi infra, p. 41 a, post.

Goods and chattels include moveables, but not fixtures.

(D) As to the extent of these words “ goods and chattels,” it has been holden, that stills which are fixed to the freehold will not pass to the assignees, under the words “ goods and chattels,” in the statute, but that the vats, &c. which are not so fixed, will pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appears to the eye of the world) of the bankrupts as reputed owners. *Horn v. Baker*, 9 East, 215. et vide *Steward v. Lombe*, supra, note (z). Salk. 568. But possession by a debtor after assignment of chattels real is within the statute. *Stevens v. Stevens*, 1 Ves. 352. *Bourn v. Dodson*, 1 Atk. 154.

Debts but not mortgages.

[41 *]

Debts are within the meaning of this section of the act, *Williams Ex parte*, 11 Ves. 7. *Richardson Ex parte*, 14 Ves. 186. But mortgages of real estate, whether original or by assignment, and though secured by bond or covenant, are not. *Jones v. Gibbons*, 9 Ves. 407. In order, therefore, completely to divest the bankrupt of debts, he must have done every thing that is equivalent to a delivery of chattels personal, that is, of moveable goods; and the judges say, that which is equivalent to moveables is, in the case of debts, an assignment and delivery of the security, if any, with notice to the debtor of the assignment.

Choses in action. Bills of exchange.

Choses in action are also goods and chattels within the meaning of the act, *Ryall v. Rolle*, 1 Ves. 348. 1 Atk. 165. S. C. 1 Wils. 260. S. C. post, 41 a. And so are bills of exchange. *Hornblower v. Proud*, 2 Barn. & Ald. 327.

Right of trading by an officer of the E. I. C.

The privilege of shipping goods from the East Indies to England, enjoyed by an officer of the East India Company's service, has been held to be goods and chattels within the meaning of the act; and therefore where he assigned this privilege, and still continued to use it, it was held a fraudulent possession within the act. *Gordon v. East India Company*, 7 T. R. 228.

Goodwill of newspaper proprietor.

So, if the printer and publisher of a newspaper assign his interest therein to a creditor, as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignee under the assignment of the commissioners. *Longman v. Tripp*, 2 New Rep.

" sition, as owners; that, in every such case, the said com-
 " missioners, or the greater part of them, shall have power to
 " sell and dispose of the same, to and for the benefit of the
 " creditors, which shall seek relief by the said commission, as
 " fully as any other estate of the bankrupt."

Upon this clause several questions have arisen.

First, whether it applies to conditional conveyances.

Secondly, on the extent of this clause, as to the nature of the things therein comprised.

With regard to the first question, it has been decided (*h*), that this statute comprehends mortgages, or conditional dispositions or conveyances of goods and chattels, and that upon the following principles, applicable to the construction of this statute. First the aim and intent of the legislature was, that an equal distribution of the effects of the bankrupt among his creditors should be obtained as far as possible. Secondly, that to attain that end, the acts of parliament should be construed beneficially for the general creditors under the commission; therefore it is, in an unusual manner different from most acts of parliament, enacted, that all these statutes and law shall be largely and beneficially construed for the creditors in general, under the commission. Thirdly, it appears the general view and intent of the provision now under consideration, was to prevent traders from gaining a delusive credit, by false appearance of substance, to mislead those who would deal with them. Fourthly, the legislature judged they might do this, by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission; because,

Stat. of 21 Jac.
 1. comprehends,
 conditional con-
 veyances.

Construction of
stat. of Jac.

[42]

(*h*) Vide *Ryall v. Rowles*, 1 Ves. 348. 372. Supra, 39 a.

67. And the advantage of a new's-walk was said, by Sir James Mansfield, in the same case, to be assets on a plea of *plene administravit*, and therefore it should seem that this species of interest would be affected by the act. It is not a tangible property, but it would be a very narrow construction to confine the operation of the statute to corporeal articles. But the future labour of the bankrupt cannot be assigned by the commissioners to the assignees. Where, however, there is any sort of interest, it appears that it may be transferred.

Benefit of
new's-walk,

but not future
labour.

where the vendee or assignee leaves such goods in possession of the bankrupt, as owner, he confides as much in the general credit of the bankrupt as that creditor, who has only taken his bond or note; it is in such case put in the power of the bankrupt to sell the goods the next day; and the former assignee could only have a personal remedy against the bankrupt. All these grounds hold in case of a mortgage, as well as that of an absolute sale; and a contrary construction would overturn this part of the statute, and restrain it to absolute sales; traders then, instead of absolute sales, would make such mortgages, and there would be greater opportunity, for traders might mortgage over and over again (E).

Mortgagee is true owner for purposes of act.

The principal thing which caused a doubt, as to the applicability of this statute to the cases of conditional sales, arose from the words in the clause, "by consent of the true owner or proprietor;" but it has been held, that they are put in opposition to a false or seeming ownership, and that, therefore, a mortgagee, who, we have seen, is in truth the owner of the property at law, though subject to redemption, may be said to be the true owner and proprietor (F).

Secondly, as to the extent of this clause, in respect of the nature of the things therein comprised (G).

In this view of the statute some doubt was entertained, whether *choses in action* were included under the words "goods and chattels."

Choses in action are chattels, and will pass by that term.

This doubt was grounded on the legal notion in respect of things in action, that they were not grantable as things in possession; but this reasoning is now exploded, and a bond debt is now clearly held to be a chattel, although some doubt was formerly made as to this, for, that in a grant of all goods and

(E) And fifthly, it is worthy of remark, that the provisions of this statute, with respect to legal interests, must be followed as to equitable ones. *Ryall v. Rolle*, ubi supra.

(F) Per Lord Chief Baron Parker, 1 Ves. 365; and see post, [182].

(G) See ante, p. 40 a, n. (D).

chattels, a bond debt would not pass; but the cause of that was, not because a bond was not in its nature a chattel, but because the question arose on a grant or assignment, or bargain and sale, these not being such goods and chattels as would pass by such assignment or conveyance: but this reasoning does not extend to an act of parliament, which may pass any thing; and, accordingly, it is held that, in an act of parliament, goods and chattels take in *things in action*. And, if goods and chattels comprehend things in action on the construction of any act of parliament, it ought in this; for otherwise the owner might assign without notice to others, and so have the order and disposition within the meaning of the clause now in discussion, and yet escape out of the purview of it. And such construction is not only enforced by the first clause of this statute, which directs, that the most beneficial construction for creditors under the commission should be made; but strongly warranted by the clause immediately preceding, relating to bankrupts, who by fraud make themselves accountants to the king, to defeat their private creditors, in which goods, chattels, debts, and other estate of the bankrupt, are expressly mentioned; and which plainly shews, that the words, *goods and chattels*, as used in this act, take in all kinds of property of the bankrupt, whether in possession or action only (H).

(H) The extent and application of the clause of the statute commented on in the text has since received a considerable portion of attention, and many cases have been decided on it. It being principally a question of fact rather than of law, (*Walker v. Burnell*, Dougl. 319.) it is almost impossible to deduce any general principles from the adjudged cases. This consideration renders it necessary to go into them somewhat in detail. They divide themselves into two classes, 1. Those to which the statute has been held to apply, and 2. Those which have been excepted from its operation.

1. In the case of *Bryson v. Wylis*, 1 Bos. & P. 83. A. B. made a fair, open, and notorious sale of certain fixtures, consisting of a dyer's plant, to I. S. and afterwards I. S. privately assigned them to A. B., and A. B. granted him a lease at a reserved rent. Lord Mansfield said, "I have no doubt that this is a new experiment to defeat the bankrupt laws. The law has said, that a trader cannot mortgage his effects, and at the same time keep possession. What is the case here? He sells and keeps possession, and pays interest for the money. If this contrivance were suffered, it would open a door to avoid the statutes, and therefore it ought not to be allowed to prevail."

Trader cannot mortgage his effects and keep possession.

If the furniture of a coffee-house be taken in execution by a creditor, and without ever being removed, be let by him to the keeper of the coffee-house,

Possession of furniture, when delusive.

13th of Eliz.
and 21 Jac. 1.
distinguished.

And it is material here to observe, that there is a striking

who becomes bankrupt while in the possession of it, the assignees may seize it under the statute. *Lingham v. Biggs*, 1 Bos. & P. 82. The mere possession, however, of a furnished house, does not of itself induce a prudent and cautious man to believe that the occupier is the real owner of the furniture, because in such cases he knows that the property in the furniture frequently belongs to the landlord. In order to ascertain whether the party in possession is entitled to the character of owner, further inquiry becomes necessary; for the possession being such that he either may or may not be the owner, the party about to trust him is not entitled to conclude from the mere possession, that he is owner. In such a case he is bound to inquire upon what terms the property has been taken, and he ought also to inquire what the nature of the usage is, in the place where the property is situate. *Storer v. Hunter*, 3 Barn. & Cress. 378.

Husband retaining possession of goods of his wife, though assigned to trustees, bad.

Goods, the property of a widow and children, were upon her second marriage assigned to trustees in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees, for the use of the children, 800*l.* by yearly instalments of 100*l.* each, from July, 1789. The husband continued in possession of the goods till 1798, having paid only 250*l.* of the instalments, when he became bankrupt. The day before his bankruptcy the trustees repossessed themselves of the goods, and it was held, that this possession of the husband was fraudulent as against creditors; for the trustees suffered the bankrupt to have the possession, order, and disposition of the goods down to the time of his bankruptcy, and therefore the case fell within the very words as well as the meaning of the statute, and consequently the assignee of the bankrupt was entitled to the goods under the statute. *Darby v. Smith*, 8 T. R. 82. This case however was said not to have been followed in 3 Madd. Rep. 66. citing *Joy v. Campbell*, 1 Sch. & Lef. 338.

[44*]

Proviso for re-possession of goods on bankruptcy, void.

If standing timber be sold to a trader with a proviso, that in case of bankruptcy, the vendor may re-take it, such a condition will be void under the statute, if the bankrupt have the disposition of the timber. *Holroyd v. Gwynne*, 2 Taunt. 176.

Administrator keeping goods of intestate twelve years, a case within statute.

Where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate for nearly twelve years, and being so in possession became bankrupt, and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees, it was held, that these goods were within the statute, being property in the possession, order, and disposition of the bankrupt with the consent of the true owner, and that the assignees were therefore entitled to them. *Fox v. Fisher*, 3 Barn. & Ald. 135.

As to reputed ownership, without possession of the goods.

These are the principal cases to which the statute has been held to apply, except perhaps the case of *Spears v. Travers*, 4 Campb. 251. where the bankrupt had the order, disposition, and reputed ownership of the goods, but not the possession; and it should seem that would be sufficient to bring the case within the statute, and entitle his assignees to the goods in question.

See further *Rabone v. Williams*, 7 T. R. 368. in notis; *Robinson v. McDermott*, Selw. N. P. 1142. etiam ante, [36] n. (r); *Nay v. Fairbairn*, 2 Barn. & Ald. 196. etiam ante, 24 a, n. (c); *Mora v. Baker*, 9 East, 215, a leading

distinction between the plan of the statute of the 13th of Eliz.

case; *Joy v. Campbell*, 1 Sch. & Lef. 338. *Addis v. Baker*, 1 Anstr. 223; *Lingard v. Messiter*, 1 Barn. & Cress. 308; *Kirkley v. Hodgson*, 1 Barn. & Cress. 588; *Woods v. Russell*, 3 Barn. & Ald. 942; *Fullop, Ex parte*, 15 Ves. 59; *Kensington, Ex parte*, 2 Rose, 130; *Colthoff v. Gregory*, ib. 149; *Richardson, Ex parte*, 1 Bank. L. C. 480; *Jackson v. Irwin*, 3 Campb. 49, where it was held, that the possession of the servant was the possession of the master.

2. As to the cases to which the statute does not extend:—Factors, bankers, lodgers, and others, who are known to have the goods of other persons in their possession, are exceptions to the operation of the act; and the ground of all these exceptions is, that the possession of such description of persons does not carry to the understanding of the world the reputed ownership. The principle of these exceptions embraces the case of furniture let with a house, and perhaps even to the case of furniture let without the house, where such lettings were usual, and by a parity of reason to utensils of trade usually let to traders, because possession in such cases would not carry the reputed ownership of the chattels, and would not impose on the world a false appearance of property in the possessor, *infra*, [45].

Stat. does not extend to factors, bankers, lodgers, furnished houses, &c.

So where a bankrupt having his certificate, and trading again on his own account, is left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the bankrupt estate (the assignees repeatedly stating the goods in inventories in their accounts with the creditors as part of the estate), such possession has been held not to fall within the 21 Jac. 1. c. 19. s. 11. so as to vest the goods in the assignees under a second commission. *Walker v. Burnell*, Doug. 317. S. C. 3 T. R. 321. *Collins v. Martin*, 1 Bos. & P. 648, and post.

Nor to possession after bankruptcy;

If A. being indebted make a bill of sale of all his goods and chattels to B. in trust to pay A.'s debts, and thereupon B. takes possession, and afterwards becomes bankrupt, this is not a possession in the view of the act. *Copeman v. Gallant*, 1 P. Wins. 314.

Nor to possession by one who holds in trust for creditors;

So where a person delivered diamonds to a jeweller to sell, and the jeweller afterwards became bankrupt, it was adjudged that these jewels being originally the plaintiff's, and the bankrupt having no more than a bare authority to sell them for the plaintiff's use, they were not liable to the bankruptcy. *L'Apostre v. La Platrier*, 2 Eq. Ca. Abr. 113. So also of goods in the possession of the bankrupt upon sale or return; in such case the party has an option to retain or send back any part or the whole of the goods, and is allowed a reasonable time to make such election; and consequently where the bankrupt only received the goods the evening prior to his bankruptcy, and in fact never unpacked them, the court held, there was no ground for saying such goods passed to the assignees under the statute. *Gibson v. Bray*, 1 J. B. Moore, 519.

Nor to possession of jewels for sale, or of goods on sale and return;

If the bankrupt have the possession of the property, and the apparent disposition of it, yet if there be not any fraud in the case, either actual or constructive, this will not be a case within the operation of the statute; and therefore if a bankrupt be in possession of the goods of another, *bona fide*, with the consent of the owner at the time of the bankruptcy, for a specific purpose, but without having any further right of disposition or alteration be-

Nor to possession which is not fraudulent;

and the plan of this statute of the 21st of Jac. 1. there being an express proviso in the former, that it shall not invalidate

yond that specific purpose, such a possession will not entitle the assignees to recover the value of the goods under the statute. *Collins v. Forbes*, 3 T. R. 316. This case, however, was questioned by Lawrence, Justice, in *Gordon v. East India Company*, 7 T. R. 237, on account of the circumstances of fraud and connivance, which he conceived to be apparent upon it; and in *Horn v. Baker*, 9 East, 228, he again intimated great doubts on that case, as did also Lord Ellenborough; and see *Cullen. Bank*. 318.

Nor to possession not permitted by true owner, as by husband, of wife's estate not permitted by trustees;

If the bankrupt be not in possession of the property with the consent of the real owner, the statute does not seem to apply. Thus, where before marriage the bankrupt's wife assigned her furniture with her stock in trade to trustees in trust, for her separate use, and sometimes after her marriage the furniture was removed to her husband's house, and she there carried on the business of a milliner, and then the husband became bankrupt, it was held, that his assignees were not entitled to this furniture; for it was not in the disposition of the bankrupt with the consent of the real owner, namely, the trustees. The trustees were the legal owners, and they gave no consent for such purpose; and the wife's possession, as her separate estate, was no evidence of fraud, for she was the agent of the trustees. *Jarman v. Wollaton*, 3 T. R. 622. *Gibson v. Bray*, 1 J. B. Moore, 519. *Haselington v. Gill*, ante, 38. It is, however, observable, that if stock in trade be thus settled on the wife for the purpose of enabling her to carry on a separate trade, and the husband intermeddles in such trade, the property will be liable to his debts.

Nor to possession after bill of sale and symbolical delivery of goods;

Where A., who had contracted with a canal company to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal; and, on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny, and afterwards the company took out execution upon a judgment confessed by A., and the sheriff seized the goods, and A. became bankrupt; it was held, that A. had not such a possession of the goods as would enable his assignees to take them within the statute; for the best delivery was given that the nature of the thing admitted, the goods being before on the company's premises. *Manton v. Moore*, 7 T. R. 67.

Nor to possession which determines before bankruptcy;

The statute transfers to the assignees of a bankrupt such goods only as by the consent of the true owner, the bankrupt has in his possession at the time of his bankruptcy. Therefore, where the purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after the sale, during which time the seller disposed of a part thereof; but, upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and, nine days after, the seller became bankrupt, it was held, that the assignees of the bankrupt were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy. *Jones v. Dyer*, 15 East, 20. See also *Smith in re*

any transaction which is for a good consideration and *bona fide*; but the latter, supposing the conveyance to be on good

Bakewell, 3 Madd. 63, et infra, where it is said, that a fire, which consumed a manufactory and premises, was a determination of the visible possession.

Where A. B. being possessed of a share of 3000*l.* stock, which was vested in the 3 per cents., in the names of himself and the Drapers' Company, on certain trusts, and, he being one of the *c'estui que trusts*, agreed to assign and transfer the same with other estates, when required, to C. D. as a security for monies lent, and afterwards became bankrupt, it was held, that inasmuch as the bank would not take notice of an agreement to transfer stock, the bankrupt had only an equitable interest, and no power to make an actual transfer; but that equitable interest passed by the agreement to the mortgagee without the legal interest, which the bankrupt could not part with; and therefore that his possession of the legal interest was not such a possession under the statute as would deprive the mortgagee of their equitable right to the stock. *Kensington Ex parte*, 2 Ves. & B. 79. 172.

Nor to possession of an empty legal interest in stock;

[46*]

A. by an agreement between himself and B., agreed, on payment to him of a certain sum, to convey to B. a dwelling-house, and to deliver to him certain household furniture therein, and other stock on the premises; and that, after formal possession delivered, A. should be allowed to remain in possession for three months without paying rent, which agreement was notorious in the neighbourhood, and the purchase-money was paid by B., and a formal delivery was made to him, and A. was left in possession of the house, furniture, and stock, according to the tenor of the agreement, and afterwards became bankrupt whilst he so remained in possession, it was held, that this was not a possession by the bankrupt within the statute; for it was part of the contract that the bankrupt should remain in possession during the three months: therefore, during that period, he was in of his own right as owner, and not by permission of the true owner, and as to his being reputed owner, the case stated that the transfer was notorious; but it would have been different if the bankrupt had retained the possession without its being part of the contract. *Muller v. Moss*, 1 Maul. & Selw. 335.

Nor to possession for three months after sale, as part of contract;

It is further observable, that this clause of the statute does not extend to goods which the bankrupt has in *auter droit*, as an executor or administrator. Where therefore a trader married a woman who was in possession of goods as administratrix to her former husband, and afterwards became bankrupt, it was holden by Lord Hardwicke, chancellor, that this was not within the statute, because the administratrix had the goods in *auter droit*, and the husband could not have them in any better right, and therefore they were not liable to the debts of the second husband; for the meaning of the statute (if it were possible to put any meaning upon some clauses of this statute, which were very darkly penned) was only with regard to goods which the bankrupt had in his own right. *Marsh Ex parte*, 1 Atk. 158. So if the executor become bankrupt, the commissioners cannot seize the specific effects of the testator not even in money, which can specifically be distinguished and ascertained to belong to such testator and not to the bankrupt himself. Per Lord Mansfield

Nor to possession in auter droit, as executor or administrator, factor, trustee, or servant;

consideration, and the party to be an honest creditor or mortgagee, yet not giving him any preference to other creditors,

3 Burr. 1369. See also *Ellis Ex parte*, 1 Atk. 101. On this principle also the statute does not extend to the possession of the bankrupt as factor or trustee, *Chion Ex parte*, 3 P.Wms. 187, n. (a). *Godfrey v. Furzo*, 3 Ib. 186. *Boddy v. Edsdaile*, 1 Carr. 62. Cullen's Bank. Law, 225; nor to the possession which he has of his wife's separate estate, ante, pages 38. 44. 45. So if a son has goods in his possession, as the servant of his father, for the purpose of carrying on a trade for the *father's benefit only*, they will not pass to his son's assignees under this statute. *Stafford v. Clark*, 1 Carr. & Pay. 24.

Nor to possession retained, when as full possession as can be has been delivered, ante, 39 b;

Nor to possession as mortgagee.

The statute does not extend to those cases where the property has been delivered to the vendee as fully as the nature of such property will admit. See *Manton v. Moore*, 7 T. R. 67, which, though not decided on this statute, affords an useful illustration of the principle here alluded to.—Where a trader, having borrowed of the defendant a sum of money, gave him a bond for 1200*l.*, and on the same day, as a collateral security, assigned to him the bills of lading and policies of insurance of the cargo of a ship then at sea; the policies of insurance were indorsed to the defendant, but the bills of lading were not. The trader became bankrupt, and a bill in equity was filed by the plaintiff as his assignee for the goods, insisting on the circumstance of the defendant not having been put in possession of them at the time. But Lord Hardwicke, chancellor, was clearly of opinion, that the defendant was entitled to retain possession of every thing until his debt was satisfied; because every thing which could show a right to the cargo being delivered over to the defendant, the bankrupt could no longer be said to have the order and disposition of it; and therefore the case did not fall within the meaning of the statute. *Brown v. Heathcote*, 1 Atk. 160. Ante, 37 a.

Same; bill of lading, and agreement to assign, passes only an equitable interest;

[47: *]

Nor to possession of sugars after mortgage and indorsement of W. I. D. C. warrants;

So where a trader who was indebted to A. agreed to assign the cargo of a ship then homeward bound, of which he had received letters of advice, and to deposit the policy of insurance on the goods in the hands of A., and as soon as the bills of lading were transmitted to him to indorse, and deliver the same over to A., on an action of trover being brought by the assignees of the trader, who afterwards became bankrupt, it was held, that the preceding case of *Brown v. Heathcote* applied strongly to the present; and although in that case there was an assignment of the bill of lading, and here only an agreement to assign, yet that did not make any difference, as neither conveyed more than an equitable title. *Lamprier v. Pasley*, 2 T. R. 485. See also *Batson Ex parte*, 3 Bro. Ch. Ca. 362. Cook. Bank. Law, 5th ed. p. 345.

And again, where A., having occasion to borrow money of B., left with him as a collateral security warrants of the West India Dock Company for sugars deposited in their warehouses and entered in his name in their books, and afterwards became bankrupt, it was held, that A. had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy so as to take the case out of the statute. The possession of the warrants carried with them the possession of the property, for the

because he has not given notice to the creditors, by having that delivery made to which he was entitled. In such case,

sugars could not be removed without the production of the warrants. The warrants were the lock and key to the property; and therefore by the transfer and indorsement of them, the reputed or apparent ownership was gone. *Lucas v. Derrien*, 1 J. B. Moore, 29. In *Keyser v. Suse*, it was contended, that the deposit of these warrants as a security for a loan was unavailing, because the property could not be legally transferred by handing over this species of instrument simply, without also delivering to the purchaser or mortgagee possession of the goods; Dallas, C. J. over-ruled this objection, and decided that the mere delivery of the dock-warrant was a constructive delivery of the goods mentioned in it, so as to deprive the defendants of their right of stopping in transitu. 1 Gow, 52. And it seems that an indorsement on a delivery-note or dock-warrant, without making the wharfingers parties to the order, or the mere giving notice to the wharfinger, without any thing done thereon, will have the same effect to complete the transfer of the property. *Zwiinger v. Samuda*, 7 Taunt. 267. *Speer v. Travers*, 4 Campb. 251. *Harman v. Anderson*, 2 Campb. 245. *Burton Ex parte*, 1 Glyn & Jam. 207. *Usborne Ex parte*, Ib. 358. But see ante, p. 29 a, as to the indorsement of a shipping-note of goods at sea.

Whether the property of a dormant partner in the possession of the visible partner is within the statute was made a quere in the matter of *Colbeck*, a bankrupt, 1 Buck. Bank. Ca. 48. 1817; but it was previously decided in the Court of Exchequer (*Caldwell v. Gregory*, 1 Price, 119. 1814.) that the share of a secret partner in the joint stock trade being in the possession of an apparent partner and the sole ostensible trader, was not liable to the bankruptcy of the latter, as being within the meaning or mischief of the statute now under consideration; for the bankrupt had such an interest and qualified property in the secret partner's share, as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other. The goods in question were the joint property of the bankrupt and the dormant partner as tenants in common, and the possession of the dormant partner was the possession of the bankrupt. It was therefore a very different case where there was no partnership; otherwise there would be an end of what is called sleeping partnerships altogether, which are carried on to so great an extent in this country. The Barons were consequently of opinion, that there was no ground for the action which was brought by the assignees of the bankrupt against the sleeping partner for the goods which he had taken away after the bankruptcy. Ib.

Nor to possession of share of a dormant partner;

It merely remains to observe on the subject of partners, that the visible possession of parties who are in a joint trade, must, to make the property available to the general creditors under the statute, be continuing up to the time of the bankruptcy. Where therefore A. and B. on entering into partnership agreed that the manufactory and utensils in trade should be the separate property of A., and that B. should pay a rent in proportion to his share of the business, and the manufactory and utensils were insured in the name of

Nor to joint possession by two partners, where one is the real owner, and the other pays rent;

Notice and registration compared. [1 Sch. & Lef. 103. 157.]

[48]

therefore, the reputed ownership he thereby gives to the bankrupt, is made, by this statute, the real ownership in him (the bankrupt) for the benefit of his creditors; in which respect the statute operates in the same manner as the registering acts, whereby the person omitting to register loses the benefit of the conveyance by not giving notice, arising from his own plain neglect. The vendee, whether absolute or conditional, is not, under the statute of James, to suffer the vendor, who has made the conveyance, to continue in the possession there described; which direction in this act of parliament is as necessary to be followed as the directions in cases of the registering acts. And accordingly Lord Cowper, in delivering his judgment in the case of *Bucknal v. Royston* (i), observed, that, in the case of a bankrupt, such keeping possession after a sale, as was then in question and held valid, would have made the sale void against creditors. Which distinction was affirmed by the judges and chancellor in the case of *Ryall v. Rowles* (k).

Retaining title-deeds after mortgage.

I come now to the second subject under the present head of inquiry, viz. the applicability of the cases, and reasoning upon the retaining possession of personal things after a conditional sale, to the instance of possession retained of the title-deeds after a like sale of real things.

27 Eliz. c. 4. s. 2.

And, in respect to this question, it is material to observe, in the first place, that the statute of the 27th Eliz. c. 4. con-

(i) Supra, 33 a.

(k) Supra, 39 a, 40.

Nor to benefit of fire insurance, when.

A., and they were subsequently consumed by fire, and afterwards a commission was issued against A. and B., it was very properly held, that the insurance money formed part of the separate estate of A., and was unaffected by the statute. *Smith in re Bakewell*, 3 Madd. Rep. 63. S. C. 1 Buck. Bank. Ca. 149. But where a sleeping partner left all the partnership property and effects in the hands of the acting partner a year and a half after the partnership had expired by effluxion of time, it was held, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern passed to his assignees, being in the order and disposition of the bankrupt, within the intent and meaning of the statute under consideration. *Enderby Ex parte*, 2 Barn. & Cress. 389. See further as to possession by partners, *Bolton v. Puller*, 1 Bos. & P. 539, 1st ed. 1 Mont. Partn. 29. Appendix. Ante, p. 22; and *Curtis v. Perry*, 6 Ves. 747.

See also some few other cases on the subject of this note, infra, vol. ii p. [1084].

sists of a variety of clauses directed to different purposes, of which the first clause only is material to the point in discussion. This clause provides, "that every conveyance, charge, "incumbrance, and limitation of use or uses, of, in, or out of "any lands, tenements, or hereditaments, made to defraud "any purchaser of the same, in fee, in tail, for life, or years, "shall, as against such purchaser only, and every other person lawfully claiming from, by, or under him, be utterly "void, the said purchaser having obtained the same for money, or some other good consideration." (H 2)

This clause, in the frame of it, substantially pursues the first clause in the statute of the 13th Eliz. c. 5, only ordaining and enacting, that conveyances, made for fraudulent purposes, shall be void in respect of third persons, without pointing out any particular circumstances, which shall be deemed fraudulent. Therefore, under this statute, as under the other, the question of what shall be fraudulent or not, within this clause, is left to construction of law upon the facts.

What shall be a fraud left to presumption of law.

By construction of law on the 13th of Eliz. we have seen, that the retaining possession of personal things, contrary to the import of a written contract, by which the interest therein is parted with, absolutely or conditionally, is fraudulent.—Why? Because the subsisting contract and the appearance are at variance; the greatest badge of ownership, the possession, being *there* where the substance is not to be found. The retaining of title-deeds, after a conditional sale or mortgage of the estates to which they relate, has the same effect.

(H 2) The third section of the statute 27 Eliz. c. 4, enacts, that every person party or privy to a fraudulent conveyance, who shall justify the same to be made *bonâ fide* and for valuable consideration, to the disturbance and hindrance of a lawful purchaser, shall forfeit one year's value of the land so purchased or charged, to be divided between the Queen and the party grieved: and, being thereof convicted, shall suffer half a year's imprisonment without bail.—Upon this section it has been resolved, First, that a mortgagee is a sufficient purchaser within this statute; and second, that one entire year's profit shall be forfeited without apportionment on a mortgage, as well as on an absolute sale. So on a lease, or a petty annuity made by fraud. *Boulton v. Wiseman*, Noy, 105.

Penalty for fraudulent mortgage.

Retaining title-deeds is to really what detention of possession is to personalty (1).

The title-deeds are, as to real things, what the possession is as to personal things; and no man can, by the utmost prudence, defend himself from imposition in real contracts, unless he is secure in taking the title-deeds; then the mischief assimilates; so by analogy ought the legal conclusion. We are to recollect, that, in the cases of personal property, the foundation upon which the prior contract is void, is not upon the ground that, as between the parties, delivery of possession is of the essence of the contract; if that were the ground, the principle would not apply to real estates, because the contract respecting them is generally effectuated by the operation of the statute of uses, which changes the ownership by a transfer of the possession in law, without any actual change of possession; but the principle being independant of the form of contracting, and applying merely to the effect of a contract on third persons, where this circumstance is neglected or omitted, it is simply a question as to the avoidance of a contract formal and valid, as between the parties, though vicious and fraudulent as to third persons.

The case of *Stone v. Grubham* (1), though arising upon a lease, contains some observations of Sir Edward Coke, which appear to me to go a great way in support of the proposition, *that to suffer deeds to be retained in such cases is fraudulent.*

Title-deeds retained by donor, after gift, clearly fraudulent.

In that case one had made a gift of all goods and chattels, real and personal, remaining and being about his capital messuage, or elsewhere, within the realm of England; and a lease for a year, (part of the grantor's property) having been held to pass by these words, it was then moved, that notwithstanding this gift so made, yet the owner still continued the possession, and so it was fraudulent. And, as to this, Coke

(1) 2 Bulst 225.

Distinction as to real and personal estates.

(1) And here by the way observe this distinction, which the cases seem uniformly to have gone upon. Personal chattels are held by possession—real estate by title—of which possession is not even *prima facie* evidence, for it may be by lease, or from year to year only. *Hiern v. Mill*, 13 Ves. 119, et vide *S. L. Lowther v. Lowther*, ib. 95.

said, if a man do mortgage his land, and yet still continues his possession, no disseisin is wrought by this (K); if it were an absolute conveyance, and a continuance in possession afterwards, this should be adjudged, in law, to be fraudulent, for this hath the face of fraud; but otherwise it is, as it is here, in this case, where the conveyance was only conditional, as upon payment of money, there the interest does not pass absolutely, but upon a future condition; for the gift was before upon condition of the payment of such a sum by the owner. As to the fraud, *dolus versatur in universalibus*; but when the conveyance is conditional, continuance in possession after this shall not, in the judgment of the law, be said to be fraudulent, and this is very clear; and the whole court agreed therein. It was then demanded, (by reason of an objection made), in whose custody the lease was after the gift? It was answered, and so proved, that the same was always after in the custody of him to whom the gift was made: COKE. *If the same had afterwards continued in the custody of him who made the gift, it would have been clearly fraudulent.*

[50]

It is remarkable, upon this case, that Coke, when speaking upon such circumstances as are fraudulent in the above cases, makes his observations, indiscriminately, upon a mortgage of land, and a mortgage of a lease; and as his observations upon an absolute and conditional sale of lands are applicable to a lease, so seem his observations upon retaining a lease, after a mortgage, to be, to the retaining the title-deeds to freehold lands after a sale. A term for years is held by a lease, a fee-simple is held by the title-deeds. The possession of the deeds is, in both cases, the evidence of the title. The suffering the retention of the title-deeds in both cases, when the ownership is incumbered or charged, enables the hanging out false colours; it, therefore, is fraudulent in respect of those who are drawn in by false appearances.

Term held by lease, fee by title-deeds.

But there is one striking distinction between the case of goods, and that of title-deeds, left in possession of the owner,

Retention of possession of goods and title-deeds, distinguished.

(K) See post, [161].

after an absolute or conditional sale; arising from the circumstance, that in the former case such possession can never be retained but with the knowledge of the vendee; whereas in the latter case many instances may occur, in which there may be every reason for the vendee to presume, that the title-deeds were not in the possession of the vendor. This circumstance will necessarily induce an exception of all such cases (amongst others) in which the person from whom an estate moves is to be presumed, from the nature of his interest, not to possess the title-deeds to the estate out of which his interest arises.

Mortgage of reversion (K 2).

[51]

Therefore, if the mortgage be of a reversion, there is no reason to postpone the mortgage upon the mere abstract fact of his not having required or procured the title-deeds and writings; because, in such cases, the title-deeds and writings do not properly belong to the reversioner, nor has he, generally speaking, any means by which he can procure them, if refused by the tenant for life, or possessor of the particular estate.

Mortgagee of reversion not having title-deeds, shall not be postponed to another mortgagee, whose mortgage was made after mortgagor came into possession, and who has the deeds, there being neither fraud nor gross negligence (L).

This question was agitated in equity before Lord Thurlow, in the case of *Tourle v. Rand*, which was as follows (n). R. being, as supposed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail, *expectant on the death of his mother*) in certain freehold estates, conveyed his reversion and remainder, expectant on the death of his mother, to A. in fee, by way of mortgage. At the time of making the mortgage, the deeds and writings were in the

(n) 2 Bro. Ch. Ca. 650.

(K 2) *Forth v. Norfolk*, 4 Madd. 503, is the case of a mortgage of a reversion; but the doctrine here discussed did not arise in that case.

(L) The doctrine in this case is good law; and it is quite settled that there must be either fraud, concealment, or such gross negligence as may be presumed to have originated in a fraudulent intention, to postpone a party from the mere circumstance of his not obtaining possession of title-deeds even where his security is not upon a reversion. Vide note (O), p. 52 a, and note (Q), p. 57 a, post.

hands of a collateral relation, but A.'s attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life, which she continued until the time of her death. Immediately after her decease, A.'s attorney applied to R. for the possession of the title-deeds, to which R.'s general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, R. being then tenant in tail in possession (but supposing himself tenant in fee of the above estate, and being also possessed of a leasehold estate) mortgaged both estates to T. At the time when the latter mortgage was made, all the title-deeds, relating to the estates, were delivered to T.'s attorney, and continued in T.'s possession. Some time afterwards T. filed his bill to foreclose the mortgaged premises, and among other things charged that A. ought not to have permitted the title-deeds and writings to have remained in the hands of R.; that he left them in his hands for the purpose of enabling him to raise more money on the security of the premises, and that the same was a fraud on T., and that therefore A. ought to be compelled to redeem T.'s mortgage, or ought to be debarred of any interest which he might have in the premises, till T.'s mortgage should be satisfied. It was contended on the part of T., that, where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced, by the title appearing on the deeds, to lend his money; that the second mortgagee therefore having the deeds should be preferred. But Lord Thurlow, Chancellor, said, that he did not conceive that a first mortgagee, not taking the deeds, was *alone* sufficient to postpone him; if it were so, there could be no such thing as a mortgage of a reversion. *In that case*, the deeds being in the hands of tenant for life, is not sufficient to turn him round. The first cases where the prior mortgagee was postponed were cases of fraud, then the same was done in cases of gross negligence. Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds: though a dowress, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her de-

cease, he might have filed a bill. But that was not sufficient to charge the mortgagee (M).

The reasoning of Lord Thurlow on this case appears to me to be equally applicable to any objection to a mortgage so circumstanced, founded upon the statute, the effect of which we are now discussing.

Second mortgagee having the deeds without notice of prior mortgage, preferred.

I have not met with any case (o) in which the abstract question, whether the circumstance of *suffering* the mortgagor to retain the title-deeds is fraudulent under the statute of the 27th Eliz. has been agitated either in a court of law, or a court of equity; but in the case of *Goodtitle v. Morgan* (N), Mr. Justice Buller considers it "as an established rule, in a court of equity, that a second mortgagee who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, (says the learned Judge) it ought to be adopted in a court of law." (o)

(o) Vide 1 T. R. 755.

Of persons entitled to custody of title-deeds.

(M) The distinction as to this point seems to be, that a jointress, who has a partial interest in the premises, may be compelled by the heir upon his confirming her title to deliver up the deeds; but a devisee for life, who has the whole estate, cannot be compelled by the remainder-man to deliver them up. Per Lord Thurlow, chancellor, in his judgment from the MS. notes of Mr. Cox. But on the other hand, if the remainder-man has acquired the possession of the title-deeds, he cannot be compelled to deliver them up to the tenant for life. *Hicks v. Hicks*, 2 Dick. 650. *Webb v. Webb*, 1 Eden, 8, and Mr. Eden's n. (a), p. 9. Et vide *Bowles v. Stewart*, 1 Sch. & Lef. 233. *Papillon v. Voice*, 2 Pr. Wms. 471, et *infra*, [631], and Dixon on Deeds.

Second mortgagee, without notice, obtaining legal term, preferred.

(N) In this case it was held, that a second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title deeds to the term, may recover in ejectment against the first mortgagee, if such second mortgagee had not any notice of the prior mortgage at the time he lent his money. It was on this doctrine and not on that stated in the text, that the case was decided; and see also *Willoughby v. Willoughby*, 1 T. R. 763, post, [446]. [452].

First mortgagee not post-

(O) It does not appear to be a general rule in Equity, that a second mortgagee, who has the title deeds without notice of a prior incumbrance, shall be

But unless the proposition, that suffering the title-deeds to be retained by a mortgagor, where he has such an estate as entitles him to hold them, is fraudulent, can be supported upon the principle that it is so at law, on the fair construction of the 27th Eliz., it appears not to be tenable upon the ground of transferring the notions of courts of equity on that subject to courts of law; because, all the cases upon that subject, which I have yet been able to meet with in courts of equity, seem, to me, to stand upon other ground, namely, that of fraud, express or implied, which has brought them within the peculiar jurisdiction of those courts. They have been either cases of combination; as, if a man makes a mortgage, and

Rule for postponing first mortgages on account of non-possession of deeds, questioned.

preferred. Negligence in obtaining the title deeds will not alone postpone the first mortgagee; there must be that gross negligence apparent on the transaction that carries with it evident marks of combination and fraud. It is true, that Mr. Justice Burnett, in the case of *Ryall v. Rowle*, 1 Ves. 360, says, "in Equity, where the first mortgagee neglects to take the title-deeds into his possession, and a second mortgagee obtains them, the first mortgagee is postponed;" and this statement was apparently acquiesced in, both by Lord Hardwicke, and the other learned persons by whom his Lordship was assisted in deciding that case. So also, in *Begket v. Cordley*, 1 Bro. Ch. Ca. 353, Mr. Ambler seems to have been impressed with the full conviction, that the foregoing statement was the doctrine of the court. Mr. Justice Buller was not therefore entirely destitute of authority for his quotation in the text. But that doctrine has since been expressly over-ruled by Lord Eldon, in the case of *Evans v. Bicknell*, 6 Ves. 190, wherein his Lordship remarked, "I conceive it is now very well settled, that the doctrine of Mr. Justice Buller is founded upon error. It would be an idle waste of time to go through all the cases to be found in *Plumb v. Fluit*, 2 Anstr. 432, and admirably well stated by Mr. Fonblanque, in *Treat. on Eq.* 1 vol. 262. (5th edit. 164, note n.) The doctrine is, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee. I agree with Chief Justice Eyre. I should have been glad to have found the rule established in the court the other way, at the same time allowance must be made for the cases put by Mr. Fonblanque, of joint-tenants and tenants in common, cases of necessary exception; all cannot have the deeds. Therefore, if the rule could be pressed to the extent to which Mr. Justice Buller carried it, those cases must be excepted in which, from the nature of the title, the deeds may be honestly out of the possession. With that exception, such a rule would avoid a great deal of fraud in mortgage titles, upon which this observation arises, that no man can tell when he is perfectly secure. But there is not such a rule."

poned for want of title-deeds, if no fraud.

afterwards mortgages the same estate to another, and the first mortgagee is in a combination to induce the second mortgagee to lend his money; or they have been cases of imposition; as, where a first mortgagee has stood by and seen another lending money on the same estate, without giving him notice of his first mortgage. These are cases of fraud, which will indisputably occasion the parties engaged therein, to lose their priority in equity; but those courts appear not to have gone, as yet, any farther.

[54]

Onus on mortgagee to account for leaving deeds with mortgagor, and to discharge himself from fraud.

Deeds not taken from second mortgagee in favour of prior one, although retained by mortgagor innocently (O 2).

But, although the cases hitherto decided in equity, appear to me not to warrant the position in the extent put by Mr. Justice Buller, in the last-mentioned case, yet several of them go far enough to shew, that courts of equity have thrown the *onus* on the neglectful person, and obliged him to account for his not having the possession of the deeds, and to discharge himself from the imputation of fraud from that circumstance. In the case of *Head v. Egerton* (p), S. made a mortgage of lands to H., who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in London, and he pretending the title-deeds were in the country. Afterwards S. borrowed 2000*l.* of E. on a mortgage of the same lands, at the same time producing and delivering to him all his title-deeds, which were perused, and approved by his counsel. Then H. exhibited a bill to foreclose E. and to compel him to discover the title-deeds relating to the premises, and to have them delivered up to him, insisting upon them, as owner of the land. E. pleaded the mortgage made to him, and that he had no notice of the prior mortgage to H. and insisted, that the court ought not to aid H. and take the title-deeds from him, without ordering him to be paid his mortgage-money; and so it was decreed by the Chancellor. Now, although in this case, H. had been, in some measure, accessory in drawing in E. to lend his money,

(p) 3 P. Wms. 380. [Acquiesced in by Lord Eldon in *Kensington Ex parte*, 2 Ves. & B. 83,—Ed.]

(O 2) A new doctrine has lately sprung into importance on the authority of this case, which is discussed *infra*, vol. ii. p. [1051.]

by permitting S. the mortgagor, to keep the title-deeds in his possession, the delivery of which H. ought to have insisted upon when he took the mortgage, yet it clearly appeared, that the deeds were not retained fraudulently; for there was a cause assigned, namely, that they were then in the country, and the mortgagor stipulated that they should be delivered,

Again, in the case of *Peter v. Russell* (q), where A. being assignee of the mortgage of a leasehold estate belonging to G. and having the lease in his custody, G. afterwards proposed to borrow a further sum of B. on a mortgage of part of the same estate; and the attorney for B. desiring to see the original lease, G. told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it safe to keep them in his own house, where all sorts of company resorted. Then G. applied to A. telling him, that he was about agreeing with a person for re-building part of the premises, at so much a foot square, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house. A. would not trust G. with the lease in his own power, but went home with him; and, after he had been there some time, G. sent for B. and his attorney, telling them, he now had the original lease, which they might see; and upon their coming to his house, G. went into the room where A. was, and desired him to let him have the lease to shew the person he had mentioned, for that he was now in the house. Accordingly, A. let him have the lease, which he carried to B. who, being satisfied therewith, lent him the money, and took a mortgage of part of the premises, insisting at the same time to have the principal lease delivered to him. But G. urging, that it concerned much more than what B. had in mortgage, said, he could not part with it. B. permitted him to keep it, and he, thereupon, in an hour's time, delivered it again to A. without acquainting him with what he had done; and A. swore expressly, in his answer, that he had no notice of this transaction, or of B.'s mortgage. Afterwards B. lent G. a farther sum of money, and he prevailed on A. to let him have the lease a second time; but A.

Thatched
House Tavern
Case.

If first mortgagee, in delivering deeds to mortgagor, is privy to his intention of borrowing more money, then he shall be postponed to second mortgage; and secus if he lends the deeds innocently, as here, to better his security.

[55]

(q) 1 Eq. Ca. Abr. 321. Gilb. Eq. Rep. 122. 2 Vern. 726. S. C.

did not know the occasion for it. Then G. failed, and A. brought his ejectment and recovered; after which, a bill was ~~filed by B.~~ to have A.'s mortgage postponed, upon the ground, that it was a manifest fraud in G., and that A. was privy to it. But this was denied, because there was ~~no~~ manner of proof that A. knew any thing of B.'s lending this money, and if there had, yet B. appeared guilty of so much a grosser neglect, that he ought not to prevail; for A. intrusted G. with his original lease but for a very little while; but B. took his word, that he could not part with it, and left it wholly in his power to go in defrauding whom else he chose: besides, it appeared that A. *was imposed upon* by G.; for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and, therefore, it could not, without manifest proof, be objected to him, that he let G. have his lease to shew B.; or with a design to draw in B. to lend his money.

Equity cannot postpone legal mortgagee merely for his non-possession of deeds, but between equitable claimants, he who has the deeds preferred.

[56]

But although a court of equity has not authority, on the ground of its own *peculiar jurisdiction*, to postpone a mortgagee on the *mere* fact of the mortgagee's accepting a mortgage, without calling for the title-deeds, or being satisfied with a reasonable excuse for their non-production, where all other circumstances stand indifferent, and the legal estate is vested in such mortgagee by force of the instrument of conveyance; because, in such case, there wants equitable facts, on which such court may found a jurisdiction, without the existence of such circumstances, the legal maxim that *æquitas sequitur legem* predominates, yet wherever the claimants stand upon equitable foundations only, there the bare circumstances of the one claimant having neglected to take in the title-deeds, and of the other having used that precaution, and possessing them, are sufficient to give him a superior equity, by reason of his specific *lien*, all other things being equal: which shews, that, in the former case, courts of equity have withheld their arm, not because the principles upon which they act, having jurisdiction, would not go all the length required; but because they were deficient in point of jurisdiction; the abstract fact of the mortgagee not taking the title-deeds, not furnishing ground to impute to him fraud, deceit, or such gross negligence,

as furnishes an inference of fraud, in the absence of which such courts are incapable of acting.

The case of *Stanhope v. The Earl of Verney* (r), before Lord Northington, in Chancery, July 27th, 1761, appears to me to warrant the above observations. The case there was, that S. being seised in fee of certain estates, subject to an outstanding term of years in R. and E. by indenture of lease and release, dated the 4th and 5th days of June, 1732, conveyed them to D. and her heirs, for securing the payment of 1000*l.* and interest, and covenanted to produce the deeds respecting the term for years. Afterwards R. and E. assigned the term to other trustees, in trust for S., his heirs and assigns; and then S. by indenture, dated the 19th of December, 1732, conveyed the same estates to N. by way of mortgage, for securing to her 3000*l.* and interest, with a declaration that the trustees of the term should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to D. Afterwards D. brought an ejectment; V., who claimed under N., defended it, and set up the term with a declaration of the trust of it in favour of N.; upon this, D. brought her bill in equity. The question was, which should be preferred? D. who had the first declaration of the trust of the term, or V., who had the *subsequent* declaration of the trust, but had the custody of the deed. Lord Northington held, that a declaration of trust in favour of an incumbrancer was tantamount to an actual assignment, unless a *subsequent* incumbrancer, *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was *equivalent* in equity to an actual assignment; and *therefore* gave him an advantage over the first incumbrancer, which equity would not take from him (P).

Custody of deeds creating term with declaration of trust, in favour of second incumbrancer, without notice of first, gives an advantage of which equity will not deprive him.

[57]

(r) Butler's n. to Co. Litt. 290 b. [Et vide 2 Eden's Rep. 81.—Ed.]

(P) This doctrine was in a measure confirmed by the present Lord Chancellor, in *Maundrell v. Maundrell*, 10 Ves. 271, where his Lordship remarked, that a subsequent incumbrancer, without notice, could not protect himself by a satisfied term, against a prior incumbrancer, unless it be in some sense

Preference acquired by possession of deed creating term.

Whether suffering deeds to be detained is fraudulent against purchasers, not decided.

Upon the whole, therefore, the question seems still open upon the construction of the statute of the 27th Eliz. whether, under that statute, suffering the title-deeds to be retained, contrary to the import of the deed of contract, where the same cannot be accounted for on good grounds, is not fraudulent as to purchasers; and the procedure of courts of equity on cases of that sort seems favourable to this construction against the title of the first mortgagee so circumstanced (q).

got in, either by taking an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term.

Suffering detention of deeds not intrinsically but prima facie fraudulent.

(Q) In the case of *Barnett v. Weston*, 12 Ves. 130, where one objection was, that the first mortgagee permitted the mortgagor to keep the title-deeds, and which he produced to the defendant as evidence that there were not any incumbrances, it was held, that unless a case of fraud could be made out, this would not alone be sufficient to postpone the first mortgagee. Hence it should seem, that the suggestion in the text cannot be adopted; for if A. makes a mortgage to B. and upon some reasonable pretext the deeds are left with the mortgagor, who afterwards sells the estate to a third person, without giving that person notice of the incumbrance, and thereupon conveys the estate, and delivers the deeds to him, it cannot be entertained that this would, under the statute 27th Elizabeth, avoid the security of the mortgagee, who lent his money innocently, and was no party to the fraud.

General expression of rule.

Cases of this nature necessarily depend on particular circumstances, but the general principle resulting from a collection of the cases on this subject is, that in order to postpone a prior mortgagee, it is necessary that he should be implicated with fraud, actual notice, or negligence so gross that it amounts to fraud, and that the mere possession of the title-deeds by a second mortgagee, without notice, will not suffice to entitle him to priority. Vide 1 Fonbl. Treat. Eq. 164, note (n). 5th edit. But it should be particularly remembered, that it appears also to be a rule, that fraud, or gross negligence, will in all cases be presumed against the first mortgagee, unless he can shew that it was impossible for him to obtain the possession of the title-deeds, or that he had used all due and necessary diligence for that purpose; and it is presumed that attested copies must be treated as title-deeds for this purpose. See further on this subject, post, [473], n.

CHAP. III.

OF WHAT IS NECESSARY TO CONSTITUTE A MORTGAGE
OF LANDS, &c. (a).

TO constitute a valid mortgage, there must be a mortgagor, *Parties.* who must be a person capable of granting, conveying, or assigning the land or thing mortgaged, and not disabled by any legal or natural impediment. A mortgagee, who must be a person capable of a grant, conveyance, or assignment to him, and not disabled to receive the lands or things grantable or assignable: And a thing mortgaged, which must be granted or assigned in that order and manner which the law requires.

An assignment of rents and profits amounts to an equitable lien, and would entitle the assignee to come into equity, and insist upon a mortgage. An assignment of deeds alone is sufficient for that purpose (b).

An assignment of rents, or deeds, is an equitable lien.

(a) [Butl. Co. Lit. 205 a. n. 1. s. 2. post, 115.—Ed.]

(b) *Ex parte Wills*, 1 Ves. jun. 162. [As to equitable mortgages, see infra, vol. ii. p. 1049.—Ed.]

CHAP. IV.

OF THE MORTGAGOR.

AS to the mortgagor, it may be observed, that whoever is disabled by the common law to take land, is also disabled to make a mortgage of it; and also many persons, who have capacity to take lands, have no ability to mortgage them; as men attainted of treason, felony, or in a *præmunire*, aliens born, men blind, deaf, and dumb, from their nativity (A),

Who may not mortgage.

(A) Persons who are blind, or deaf, or dumb, or who at the same time labour under two only of these infirmities, may mortgage their estates if it appears that they are capable of comprehending the nature of the transac-

Persons blind, deaf, or dumb, may mortgage.

idiots, madmen, *femes covert* (B), infants (B 2), men under duress, &c. for conveyances made by persons under these disabilities, may be avoided.

*Tenant in fee
may mortgage.*

But every person who has an estate in fee-simple in lands, tenements, or hereditaments, whether the same be legal or

tion. It was formerly proverbial, that a person born deaf must of necessity be dumb, because, being deaf, no idea of sound or language could be instilled into him. The wonderful discovery made by the Deaf and Dumb Asylum, has, however, now taught the deaf to speak, and even to converse with considerable fluency. The three cases on this subject are, *Elliott's case*, Cart. 53. *Griffin v. Ferrers*, Barn. 19. *Keys v. Bull*, Ib. 23.

*Idiots and
lunatics.*

A mortgage will not be set aside from the insanity of the mortgagor after his death, if the transaction remain unchallenged for a length of time; and if impeached within a reasonable period, parol evidence of a general insanity will not be sufficient to vitiate the assurance; to effect *that*, there must be proof of insanity at the time the mortgage deed was executed. *Towart v. Sellers*, 5 Dow. P. C. 231. But a committee of an idiot or lunatic, at the discretion and under the direction of the great seal, may raise money on mortgage of the lunatic's estate for payment of debts. 3 Madd. Ch. 747. 2d edit. The court, however, will never permit any part of the lunatic's estate to be laid out on private security. *Calthorpe, Ex parte*, 1 Cox. Eq. Ca. 182. And where a mortgage is paid off out of a lunatic's personal estate by order of the court, the court will not, during the life of the lunatic, determine whether the payment shall be for the benefit of the lunatic's real or personal representatives, because the question may never arise. The mortgage term will be directed to be assigned in trust to attend the inheritance, or for the lunatic, his executors, administrators, and assigns, as shall thereafter be determined in the matter of the lunatic, or in any suit to be instituted for that purpose. *Earl of Digby, Ex parte*, 1 Jac. & Walk. 640. Vide post, 285, n.

[59*]
*So may women
having separate
estates.*

(B) Married women having a separate estate, may, it seems, exercise every act of ownership over such estate, and consequently they may mortgage, and *that* without the concurrence of the trustees, unless their consent be rendered necessary by the instrument giving the feme covert such separate property. See 1 Ves. jun. 189. *Essex v. Atkins*, 14 Ves. 542, and cases there cited.

Infants.

(B 2) But persons executing mortgage deeds will be presumed of age till the contrary be shewn. This was the case with Dean Swift. He was an infant when a decree in the cause of *Loftus v. Swift*, 2 Sch. & Lef. 649, was made, but afterwards executed a mortgage deed, and Lord Redesdale, C. said, he must presume the Dean to be then of age, as he executed the deed, and there was no ground for a contrary presumption. The Dean is charged with having practised an imposition, but it was evidently under a mistaken notion of his rights.

equitable; not affected with any of the incapacities above alluded to, may be a mortgagor, and may pledge such estate, to the utmost extent of that interest.

And some persons also, who have but a qualified interest in lands, tenements, or hereditaments, may be mortgagors, as tenants in tail, for life, for long terms, or the like (c). *So may tenants in tail for life, and for years.*

(C) As to tenants for life, they have estates of freehold. A conveyance therefore calculated to pass that description of interest, should be resorted to as the mode of security. The mortgage will take an estate *pur autre vie* by the mortgage, which may be limited either to his real or personal representatives at pleasure; but as the estate will, in whatever mode it be limited, belong in equity to his personal representatives (who in all cases are entitled to the mortgage-money when paid, ante, p. 8), it will be proper to limit it to his executors, and not to his heirs. If the tenant for life have a power of leasing annexed to his estate, the mortgage may be made by demise, for a term of ninety-nine years, if the tenant for life shall so long live, with a covenant that all estates limited by means of the power during the continuance of the mortgage, shall be for the benefit or under the direction of the mortgagee. By this means, the whole beneficial interest will be divested out of the tenant for life, yet a probable reversion will revert to him for the purpose of supporting the power which would otherwise have been extinguished by an alienation of the whole life interest. In other cases, the mortgage may be made either by feoffment with livery of seisin, bargain and sale enrolled, or as is now most usually the case, by lease and release, Forms of which will be added in the Third Volume. *Mortgages by tenants for life.*

Every species of life interest, however, is not mortgageable. Thus the half-pay of officers in the army or navy, is held not to be assignable. See *Stone v. Litterdale*, 2 Anstr. 533. *Flarty v. Odum*, 3 T. R. 681. *Litterdale v. The Duke of Montrose*, 4 Ibid. 248. In a late case it was distinctly held, that an officer cannot pledge or mortgage his commission; and that a lender of money upon the security of such pledge and deposit, will not be entitled to any preference over the general creditors of the borrower, although it be agreed that the commission shall be sold, and that the particular lender shall be first paid out of the proceeds of the sale, *Collyer v. Fallon*, Chanc. 10th Dec. 1824. MS. And it seems that the profits arising from the office of Clerk of the Peace are not assignable; for such an assignment would come within the statute 5 & 6 Edw. 6. c. 16. prohibiting the sale of "offices which shall in any ways touch or concern the administration or execution of justice." *Palmer v. Vaughan*, 3 Swan. 173. *Infra*, 300. *S. P. Palmer v. Bates*, 2 Brod. & Bing. 673. The assignment in this case, was of the profits of the office for payment of creditors, which was held invalid though for so meritorious a purpose. In like manner the profits of a Register's office of a Consistorial Court cannot be assigned; but a deputy, it seems, may be appointed. *Wheeler v. Trotter*, 3 Swan. 174. And it is observable that the king may by letters patent suspend *What life interests may not be mortgaged.*

Tenant in tail compellable to suffer recovery (D).

And if tenant in tail mortgage lands, the court of Chancery will ultimately compel him to suffer a recovery, that being necessarily incidental to his making a good title. But where the mortgagee brought his bill against the mortgagor (a) to compel

(a) *Sutton v. Stone*, 2 Atk. 101.

a public officer, though the office be granted for life. But after the suspension the officer is entitled to receive the salary; yet he cannot exercise the functions of the office. *Slingsby's case*, 3 Swan. 178.

So the salaries of the Judges and many other civil officers, which being granted for the support and dignity of the state or the administration of justice, are therefore holden to be inapplicable to any other purpose. See *Flarty v. Odium*, *ubi supra*. The same may be affirmed of the benefices of the clergy with cure, which are *beneficia propter officium*, and necessary for their decent support and respectability in the administration of their holy office. See 13 Eliz. c. 20. 43 Geo. 3. c. 84. s. 10, and *Hunt v. Singleton*, Cro. Eliz. 564. *Carter v. Claycoles*, 1 Leon. 306. *Mouys v. Leake*, 8 T. R. 411. *Middleton v. Croft*, 2 Str. 1056. But per Buller, J. "pay in arrear may, like any other existing debt, be assigned, but not future accruing payments." 8 T. R. 411. *Et vide* 2 Vern. 595.

As to mortgages by tenants in tail.

As to tenants in tail, the next note will shew the necessity of obtaining from them a fine or recovery, as part of the mortgage security; for although a recovery suffered by the tenant in tail after the mortgage, will operate to confirm all prior incumbrances, yet if the tenant in tail should happen to die, without barring the entail, the mortgage will fall to the ground, save only so far as the mortgage-money can be recovered by means of a collateral security, as a bond or otherwise; for the covenant for further assurance in the mortgage deed will not be enforced in equity against the issue in tail. For the form of a mortgage by a tenant in tail, see the Third Volume.

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Issue in tail not compellable to suffer recovery.

(D) But the court of Chancery will not compel the issue in tail to suffer a recovery, if through negligence, sudden death, contempt of court, or otherwise (Gilb. Rep. 164. 2 Vern. 306. 1 P. Wms. 720), the ancestor should have failed to have done it in his life-time, even though there were a covenant for further assurance, because the issue in tail are not bound, either at law or in equity, to complete any contract or agreement made by their ancestors respecting the estate tail. The issue in tail claim *per formam doni*, from the person by whom the estate tail was originally granted, and not from their ancestor. (3 Co. 41 b. 1 P. Wms. 721. 3 Ves. 684.) And therefore, where a tenant in tail made a mortgage without levying a fine, with a covenant for further assurance, and died, Lord Keeper Bridgman refused to enforce the covenant against the issue, though his Lordship admitted that the father might have been compelled to have levied a fine, or suffered a recovery in his life-time. If, however, the issue in tail do any act towards carrying the contract or agreement of their ancestor into execution, it will then become binding on them, and they will be compelled in equity to perform the covenant for further assurance in specie. *Ross v. Ross*, 1 Ch. Ca. 171. See further, pages 165. 190. 212, post.

him, as tenant in tail, to make a good title by suffering a recovery, it was said that the court of Chancery would not point out what title the mortgagor should make, but would decree him to make such title to the mortgagee, as he was capable of doing; and accordingly, that court directed a good title to be made by the defendant to the plaintiff.

And, in some instances, persons who have no beneficial interest in lands mortgaged, may become mortgagors, by virtue of a power or the like. And of persons who may be mortgagors, although they have no beneficial interest in the land, &c. mortgaged, some are invested with that capacity, by express authority from those through whom they derive such power; others receive that capacity, as involved in other capacities of a more enlarged and efficient nature; and others, again, are clothed with that capacity by inference of law or equity, resulting from the evident intention, that such capacity should be annexed to the character of the person invested with such power, the object for which such interest was conferred, not being attainable without that power being implied.

Of mortgages by persons not beneficially interested.

Trustees, empowered expressly by virtue of settlements, deeds of trust for discharging of debts, and the like, to raise money by mortgage, fall under the first class of mortgagors last mentioned (E).

By trustees having express powers.

Under the second class of mortgagors, last alluded to, those persons are included, who are invested with powers of sale,

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Power of sale includes a power to mortgage.

(E) Mortgages by trustees, who have power to raise money by sale or mortgage, must of necessity be deficient in what is generally considered an essential article in every mortgage transaction, namely, the covenants; for they cannot be expected to enter into any stipulations or agreements concerning the payment of the mortgage money, the validity of the title, &c. But there does not appear to be any well-founded objection to the mortgage on that account. A purchaser cannot resist specific performance of his contract merely for the want of covenants for the title. The covenants entered into by the prior owners run with the land, and may be taken advantage of by all subsequent possessors, though as it should seem they have but part only of the lands over which the covenants originally extended. *Twynan v. Pickard*, 2 Barn. & Ald. 111. Hence it behoves the intended mortgagee to look well into the title of the trustees, and their settlor or deviser, prior to the advance of his money. But the title being good, it is presumed he may be compelled to accept it without any mortgage covenants, merely with covenants by the trustees, that

Mortgages by trustees.

[61 *]

for the purpose of raising money for payment of portions, debts, &c. For a power to sell *for such purposes*, implies a power to mortgage (*b*), which is a conditional sale (F).

The word "*profits*" implies a power to mortgage.

The third class above-mentioned, comprehends trustees upon trust to raise money out of the *rents* and *profits* of lands for meritorious purposes, or within a limited time. Such persons,

(*b*) 3 P. Wms. 9.

Use of covenant for payment of money.

they have not incumbered, and that they will do any further act for the more satisfactory assurance of the premises to the mortgagee to the extent of their power. The use of the covenant for payment of the money, is to give the mortgagee an action of covenant on non-payment of principal and interest, without his being obliged to resort to the circuitous methods which are open to him by breach of the condition. It is a collateral advantage, and no part of the mortgage, and therefore it should seem the want of a person to enter into such a covenant, will form no impediment to the completion of the contract on the part of the trustees, the mortgagors, in the consideration of a court of equity. But if the person next entitled to the remainder or reversion expectant on the term or estate of the trustees, can be prevailed upon to join in the mortgage, it will be a desirable object, as every difficulty, especially with a view to any future transfer of the mortgage, will then be obviated. In the form in the Third Volume, cir. No. 12. which was an assignment of a term of five hundred years, created by the will of R. D. for raising and securing a sum of money to answer the purposes of his will, namely, to pay debts and legacies, the tenant for life joined the trustees, and covenanted for the payment of the money, and entered into the usual mortgage covenants. Et vide post, 101, 2, 5, as to mortgages by trustees and executors.

If power to sell and mortgage, will authorise sale after mortgage.

It may in this place be worth observing, that with regard to the accurate preparation of powers of sale and mortgage, if the parties intend that a sale may be made after a mortgage, in order to pay it off, that intention should be clearly expressed, as it is doubtful whether, if a mortgage be first made, the power will not be wholly exhausted, so that a sale cannot afterwards be made to exonerate the estate; and it is clear, that in a case of this kind the mortgagee cannot require a sale, even if the power authorise a sale, for he is not an object of the power, further than as that power enabled the donee to make him a good mortgage. When he has that, he is in the ordinary situation of a mortgagee. He has all the remedies, but only the remedies of a mortgagor, and therefore, in order to confer on the trustees a power to sell and pay off the mortgage which they have made when it appears to them expedient, it seems necessary to introduce an express clause for that purpose in the original power, as the readiest means of obviating the difficulty. See *Palk v. Clinton*, 12 Ves. 48. *Omerod v. Hardman*, 5 Ves. 722.

(F) Consequently, where it was held that a power to raise a sum generally, implied a power to sell the estate (*Wareham v. Brown*, 2 Vern. 153), the trustees having that power, may either sell or mortgage, as they may think expedient.

when so entrusted (c), unless there be words to restrain the meaning of the terms *rents* and *profits*, and confine them to the receipts of rents and profits as they accrue (d), (as if the trust be expressly to pay debts and legacies or portions, out of the *annual* rents and profits), are, on an equitable construction of the settlements by which they are constituted trustees, considered by the liberal construction of these words, (the land, and the profits of the land, being the same thing at law) (e), as invested thereby with a power of raising it by anticipation, as by selling, and consequently mortgaging; these being the only means by which the trusts, they were constituted to perform, can be effectually fulfilled. This, therefore, is a construction made in order to effectuate, substantially, the end and intention of the parties, which intention ought always to guide us in expounding instruments constituting trusts. As in the case of a devise of lands to trustees on trust, out of the rents and profits to pay debts and legacies, which, in the case of a will, authorises the trustee to sell (f), and consequently to mortgage the land itself; or in the case of a trust created to pay portions out of rents and profits of an estate at *prefixed days*, and within a period, during which the same cannot be raised out of the annual profits (g), which also implies a power of sale or mortgage within the intention of the trust. A trustee, therefore, in either of these predicaments, may be a mortgagor; for though the strict and natural meaning of the word *profits*, as opposed to land, is *annual profits*, yet, in a more enlarged sense, and in order to prevent an inconvenience, it is now taken in such cases to include every mode by which land may be made to yield profits, out of which money so charged upon it may be taken, and, consequently, to include sale or mortgage. And this construction has prevailed ever since the time when Lord Somers presided in Chancery (g).

Meaning of the word "*profits*."

(c) *Mills v. Banks*, 3 P. Wms. 1. 1 Ch. Ca. 176. Pre. Ch. 395.396.

(f) *Ligon v. Foley*, 2 Ch. Ca. 205. 1 Vern. 104.

(d) An heir, as well as the children portioned, may insist upon a sale. 2 Vern. 421. Vide *Okeden v. Okeden*, 1 Atk. 550.

(g) *Backhouse v. Middleton*, 1 Ch. Ca. 175.—[Afterwards revived by Lord Cornbury, and dismissed on another point. 1 Ch. Ca. 208. See also *Carey v. Appleton*, 1 Ch. R. 240.—Ed.]

(e) Co. Litt. 46.

(G) A period of about 130 years since. The case in which his Lordship alluded to this doctrine, was that of *Sheldon v. Dormer*, 2 Vern. 310, where it

Here two points obviously offer themselves for our consideration.

First, in what cases money, charged on lands for such purposes as those to which we have above alluded, may be raised by mortgage.

was held, that there being a trust for raising portions out of the rents and profits, the lands might be sold.

If right of entry on non-payment confers power to mortgage.

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It is also observable, that it appears to have been held, that a power to enter into possession of an estate in case of non-payment of the portion, legacy, &c. which has been charged thereon, and to retain such possession till the charge be paid, will be equivalent to a power to raise the burthen by the profits of the lands, taking the word "profits" in its most extended import if that construction be not inconsistent with the intention of the parties. Thus, in the case of *Baron v. Clarke*, Mich. 5 Anne—A. being seised in fee of an estate at M., and of another in reversion at E., devised the estate at M. to his wife, and after her death to his eldest son and his heirs, upon condition that he would pay the plaintiff, who was a daughter, 1200*l.* in twelve months after the death of one E., which, if not paid within the time, the daughter might enter into the estate at E. till payment. The deviser died soon after, and so did E.; and, at the expiration of twelve months, a bill was brought for a sale; and the court was of opinion, that the time appointed for payment being twelve months after the death of E., that time being come the money ought to be paid, and there being no way of doing that but by a mortgage or sale of the reversion, the one or the other must be decreed, and a sale was decreed according to the prayer of the bill.

So in another case where lands were limited to three females for their respective lives and jointures, with remainder to H. M. for life, with remainder to the first and other sons of the marriage in tail male, upon agreement that if H. M. at his death should have only one daughter by his wife, and no son, then the persons in remainder, except the jointresses, should pay unto such daughter the sum of 2000*l.* at one entire payment at Midsummer then next, after she should be sixteen, with a power, in case of non-payment, for the daughter to distrain the lands for the same with damages. An only child of the marriage after the death of her father, attained the age of sixteen, and married, and afterwards she and her husband brought a bill for raising the portion of 2000*l.* by sale of the premises, it was insisted, that she ought to take her portion out of the rents and profits; for that the lands subject to the portion beyond the jointures were but 120*l.* per annum, and the more because there was not any express power given to the trustees to sell by the settlement, nor to the daughter to enter and hold till she was satisfied, but only a bare power to distrain. But, inasmuch as the portion was to be paid with damages at sixteen, and the plaintiff was twenty years old when she married, and as the portion was no more than the marriage portion of her mother, the Lord Chan-

Secondly, at what time such money may be raised.

First, no *express* mention need be made of a specific time to bring a case within this rule of construction, as it is sufficient if enough be said to furnish the court with a reasonable ground to suggest the period which must have been intended. Thus, in the case of *Trafford v. Ashton* (h), the trust of a term of 99 years, limited after an estate for life to husband and wife in a settlement, was declared to be, that, if A. the tenant for life, should die without issue male, and should leave one or more daughters, then the trustees should, out of the rents and profits, raise 8000*l.* for the daughters of that marriage, as soon as conveniently might be, without limiting any express time when the portions were payable. Husband and wife were both dead, and one question was, whether this 8000*l.* should be raised otherwise than out of the yearly rents and profits. And, it was held, that it should be raised by sale or mortgage. And the principal reason was, because the words *profits of lands*, especially when to pay debts or portions, implied any profits that the land would yield either by selling or mortgaging. And it was said, that *here* was a certain time named for payment of the portions, and that implied, though not expressed, viz. they were to be paid *as soon as conveniently might be*; now, that was presently, for the daughter being twenty-one, at the death of tenant for life, and marriageable, it was then convenient. And it was decreed, that the portions should be raised by sale or mortgage, as should be agreed by the master and the parties.

If yearly profits cannot raise sum within time appointed, mortgage may be made, and time may be implied.

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And, although the authorities (i) on this head of equity confine this implication of a power to raise profits by anticipa-

If rents cannot raise sum within reasonable time, mortgage may be made.

(h) 1 P. Wms. 415. Et vide *Sir John Talbot v. Duke of Shrewsbury*, v. *Dixon*, 1 Ves. 41. and see 1 Ves. 94. (i) 1 Atk. 550. 2 P. Wms. 669. Gilb. Rep. Eq. 89. Prec. Chan. 394. 2 Vern. 72. 669. *Gibson v. Montford*, 1 Ves. 485. *Baines*

cellor declared that he would presume it to have been the intention of the parties that the portion should be raised by the trustees on the day appointed for its payment, and as the remainder-man refused to pay it, and a sale was prayed, he would decree a sale accordingly. *Mussey v. Meynell*, 2 Vern. 1.

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tion on mortgages, to cases where some particular time is mentioned or alluded to (as in the last case) for the payment, at which period the profits, if taken as they ordinarily accrue, will not effect the purposes of the trust; and certainly courts have laid great stress upon that circumstance, as authorising them to enlarge the power of the trustees; yet the principle, it seems to me, may be extended farther, viz. to all cases where the intention of the parties and purpose to be effected cannot be brought about within a reasonable time, unless by such anticipation. Thus in the case of *Stanhope v. Thacker* (k), where lands were conveyed in settlement to trustees and their heirs to the use of A. for life, then to B. for life, remainder to C. their son, for 99 years, remainder to his intended wife for her jointure, remainder to the first and other sons of the marriage in tail male successively, remainder to the daughter and daughters of that marriage, and the heirs of their bodies till they should, out of the rents, issues, and profits of the same premises, have raised and received the sum of 3000*l.* with remainder over after the said sum raised. The court having determined, that the limitation to the daughters was but a security till that money was raised, held, that the 3000*l.* being to be raised out of the *rents, issues, and profits*, if the ordinary or annual rents and profits of the lands would not raise the money in a convenient time *to answer the intent of the settlement*, which was to provide portions for the daughters, the same might be decreed in a court of equity to be raised by sale or mortgage thereof, which were the *extraordinary* profits of the same lands; for, otherwise, if the daughters should be confined to raise the 3000*l.* out of the annual rents and profits only, they would be eating out their portions, and might never have any sum adequate to the provision intended for them (H).

(k) Prec. Chan. 435.

Rents must
raise portion in
reasonable time.

(H) So in *Warburton v. Warburton*, 1 Bro. Par. Ca. 34. a trust term was created for the purpose of raising portions out of rents and profits, and it was decreed that the portions should be raised by sale or mortgage of the trust term. And in another case where a person had a power "from time to time, and at all times to mortgage, engage, or otherwise charge all and every the premises, or any part thereof with the payment of all or any of his debts, or

And a trust created by will for payment of debts (1), whether they be simple contract, or specialty (for as to the trust both are on a footing, though there be no term created for that purpose), gives, in a court of Equity, incidentally authority to make a mortgage or sale; because the estate, by virtue of such devise, becomes a trust, and such court having jurisdiction to liquidate, after liquidation can give interest for the debt.

Trust by will to pay debts, confers power to mortgage (1).

Then the debt, being a gross sum with the interest, becomes an incumbrance, and a mortgage may be made to pay it off; and in such case, the creditors, if not paid, can have no relief but by application to a court of Equity, because they can have

Then the debt and interest becomes an incumbrance.

(1) *Earl of Bath v. Bradford*, 2 Ves. 587. *Cook v. Parsons*, Prec. Chan. 184.

otherwise, as he should think fit;" and he exercised this power by charging certain parts of the estates with the payment of portions to his grand-children, to be paid at twenty-one, or marriage, with reasonable maintenance in the mean time. It was held, that the portions should be raised by sale or mortgage, and not by perception of rents, because it could not thereby be received in any reasonable time, and the party entitled might be abridged of half the value of the portion by that manner of raising it. *Kelly v. Bellew*, 1 Bro. Par. Ca. 202. But where a trust was to raise out of the rents and profits of the premises, or by sale or mortgage thereof, a certain sum for the portions of younger children, with a direction to pay to the first tenant for life when he should attain 21, the rest of the rents and profits, if any should remain in their hands after payment of his debts, and the money intended for his younger children as aforesaid; it was held that the accumulated rents and profits which had arisen from the rents during the minority of the tenant for life, were first applicable to the payment of the portions, and that the deficiency only could be raised by sale or mortgage, the V. C. observing, that this testator had expressly stated, that the first devisee who attained 21, should take such accumulated rents and profits only as should remain after satisfying the portions, and of consequence must have intended that the accumulated rents and profits should be first applied in payment of the portions. *Warter v. Hutchinson*, 1 Sim. & Stu. 276. S. C. on other points, 5 J. B. Moore, 143. 1 Barn. & Cress. 721.

(I) And as to the words which create a trust to pay debts, it was decreed by Lord Nottingham in one case, that where a person devised in these words, "my debts and legacies being first deducted, I devise all my estate real and personal to I. S.," it amounted to a devise to sell (and consequently to mortgage, ante, 60.) for the payment of debts. *Norman v. Johnson*, 1 Vern. 45. et vide 3 Meriv. 312.

What words create trust to pay debts.

no action against the heir, or against him and the devisee; and then when all or any of the creditors join in, or bring a bill for satisfaction of their debts, and to have a performance of the trust by sale or mortgage, from the moment the mortgage is made, that also it is clear carries interest.

Trustees may mortgage for payment of debts without waiting for decree.

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And as the Court of Chancery will, upon bills brought by creditors, decree money to be raised by mortgage or sale, so they will support trustees who mortgage without such decree first had, *if it be fairly done*; for the trustees need not wait for a decree of the court, which, if it were necessary, would oblige every person to come there, but they may do it without: And this is plain, if we consider the nature of a decree of that court, for such decree does not *create* or *give* a right, but only enforces an execution of a trust and power *before subsisting*.

How equity acts in allowing interest on such debts.

And, in allowing interest in such cases, equity acts by analogy to the proceedings where creditors are left to their legal remedy; for, if a bond creditor bring an action against the heir at law, or against him and the devisee jointly, and (since the statute of fraudulent devises) if the heir in case of descent, or heir and devisee joining in case of a devise, come in and confess real assets (which in justice they ought to do), in that case judgment goes against them for the debt, to be levied out of the estate; but, because it cannot be known how much the value of the land descended or devised is *per annum*, there issues a writ of inquiry to the sheriff, and the judgment proceeds, that the sheriff shall deliver the lands to the plaintiff *donec debitum predictum levaverit*; then the sheriff makes an inquiry in nature of an extent, fixes the extended value, which is always much *below* the real value of the lands, and delivers them to the plaintiff according to that value. The remedy that the heir and devisee have, is by *scire facias*, to have an account and the lands delivered back. But a court of law will do that only according to the extended value by the sheriff; therefore, the heir and devisee must come to a court of equity to have it extended according to the real value, and to have it back afterwards: but the court will insert terms, namely, upon paying interest; for a court of equity will not extend its power

to assist the heir at law or devisee, but according to equity, by making him answer satisfaction and do justice.

The declaring an estate "to be chargeable (m), and to stand charged with the raising a sum of money for the benefit of children unprovided for, in such manner and in such proportions, as the survivor of the father or mother should appoint," would not only include a power of raising the money by mortgage or sale, but a certain determinate time for raising it.

Power to portion includes a power to raise it by mortgage at a certain time.

And portions may be raised by mortgage, whenever, by construction of law, they become payable; for, from that time they bear interest, but not before, unless there be a special provision to that effect on limiting them; because portions do not carry interest as due thereon by virtue of their own *intrinsic* nature, but in respect of forbearance of payment, as in case of any other liquidated sum due (κ).

When portions may be raised, and when they bear interest.

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(m) *Green v. Belchier*, 1 Atk. 505.

(K) Interest is payable on portions from the time they become due. *Primrose v. Taylor*, 1 Bro. Par. Ca. 23. *Hall v. Carter*, 2 Atk. 357, notwithstanding that time may arrive during the minority of the children. *Lydon v. Lydon*, 14 Ves. 558; and a portion will carry interest from the time that it might have been raised, and an inquiry will be directed to ascertain that time. *Bagewell v. Bagewell*, 3 Bro. Par. Ca. 51; but so long as portions remain liable to a contingency interest will not be payable. *Reresby v. Newland*, post, 91. A portion may vest at twenty-one in the parent's life-time, and from that time it will bear interest, although it be not raisable till after the parent's death, 1 P. Wms. 480. 14 Ves. 558. et vide post, 79, and n. (a). But it should seem, if the payment of the portion be postponed till the parent's death, it will not carry interest till that event has happened. And when a portion is to be raised by perception of the rents and profits, it is not considered as a gross sum due at a certain time, but a right to receive the rents as they become due; and consequently such portions do not bear interest for the parts which from time to time remain unpaid. 2 P. Wms. 671. If the person in reversion wishes to redeem the term, and exonerate the estate, he cannot do it without paying interest on the portions from the time they become due. *Hall v. Carter*, ubi supra. *Kenmore v. De Grey*, 1 Eq. Ca. Abr. 341, pl. 4.

As to interest on portions.

A portion charged on real estate carries interest at four per cent, *Guillam v. Holland*, 2 Atk. 343, from the time the portion ought to be raised and paid, although interest is not mentioned, *Pomfrett v. Windsor*, 2 Ves. 487, because it may be necessary that interest should be given by way of maintenance, for there may be no other. *Boycott v. Cotton*, 1 Atk. 555. But where there is a

After what rate.

A particular mode prescribed, implies a negative against every other more extensive mode.

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But, wherever a trust of a term for raising portions prescribes a particular method for raising them, it implies a negative, that they shall not be raised in any other way (n): as if it authorises the trustee to raise and pay out of the rents and profits of the estates charged, as well *by leases* for one, two, or three lives, or for any number of years determinable thereon, as for twenty-one years absolute at the old rent, a certain sum for daughters portions; for, in such case, it is as much the intent of the settlement, to confine the manner of raising the portion to leasing, as to secure any portion at all, and, consequently, it would be a plain breach of trust to raise it any other way (L).

(n) *Ivy v. Gilbert*, 2 P. Wms. 13. Vide 1 Ves. 94. Lord Hardwicke's observations on this case. Et see *Evelyn v. Evelyn*, 2 P. Wms. 659. *Sir John Talbot v. Duke of Shrewsbury*, *Mills v. Banks*, 3 P. Wms. 1. 6. 8. Gilb. Rep. Eq. 89.

power to raise portions for children by a charge on an estate, that power necessarily imports a discretion in the party exercising the power to prescribe what rate of interest shall be payable from the time the portion to be raised is payable or vested, provided it does not exceed legal interest. *Lewis v. Freke*, 2 Ves. jun. 511, and see *Boycott v. Cotton*, 1 Atk. 552. The court only interferes by giving four per cent. where no rate is specified by him who has a right to fix the sum. 2 Ves. jun. 512. *Roe v. Fogson*, 2 Madd. Rep. 457.

From what time interest will be given.

In cases where parties sleep upon their rights, and no compromise or discussion of their claims has taken place, and where the defendant is ignorant thereof, and there is no disability on the one side, nor fraud on the other, interest will not be given on a portion, or an account directed of the rents and profits further back than the filing of the bill. *Barrington v. O'Brien*, 1 Ball. & Bea. 180, and see 14 Ves. 558.

[68 *]
What if no time appointed for payment of portion.

(L) In this case of *Ivy v. Gilbert*, the true reason for decreeing the portion to be raised out of the rents, appears to have been, that no time having been appointed for payment of the fortune, it could not carry interest, and then it could not be raised by sale or mortgage, since either of those methods necessarily imported an immediate time of payment, and accordingly a right to interest. At the hearing before the Lords, 2 Bro. P. C. 468, it was insisted on for the appellants, that daughters' portions in their nature required to be paid in gross sums, and that where there was a term absolute in trust, there was an estate sufficient in law to raise them by sale or mortgage, and that it must be taken to be the primary intent of the parties in every such case, that the portions should be paid immediately, since otherwise the remainder-man, especially if he were but a tenant for life, might be starved by a total application of the profits of the estate towards discharging the incumbrance. But the Lords, after great consideration, affirmed the decree, which seems decisive

Three rules of construction.

Where a will contained a clause, "that the trustees should, by perception of the rents and profits, or by *leasing or mortgaging* the same, raise and levy the sums and legacies made payable out of lands, amounting to 30,000*l.* and should pay the same in such manner as in the said will before-mentioned." Lord Hardwicke refused to decree a sale (o), observing, that where a man created a term for payment of debts, and declared the trust of that term to be by perception of rents and profits, or *by leasing or by mortgaging* to raise sufficient money for the payment of his debts, it restrained it merely to a payment out of the rents and profits; if it had been a trust of the rents and profits, he said the term might have been sold for the satisfaction of creditors.

Power to raise, by lease or mortgage, negatives power to sell.

So it was held by Lord Nottingham, in the case of *Cook v. Parsons* (p), that a devise to trustees and their heirs, to set and farm let, and out of the *rents* (without saying and profits), to pay his debts, that the words "let and set, and out of the rents to pay," were not sufficient whereon to ground a decree for sale.

Power to let and set, and out of rents to pay, &c. confers no power of sale.

In cases, where the words and intent of the parties are plain, no arguments from the inconveniences that may result to the objects of the settlement, from the prescribed mode of raising the money, are of force; because the same settlement, which orders the payment of portions at eighteen or twenty, or, as soon after as the same can be raised by the means pointed out,

Arguments of inconvenience cannot alter plain words and intention of parties (M).

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(o) *Ridout v. Earl of Plymouth*, v. *Maidwell*, infra. *Sir John Talbot v. Duke of Shrewsbury*, Gilb. Rep. Eq. 2 Atk. 105.

(p) Pre. Cha. 184. Et vide *Corbet* 89.

of three points: *first*, that daughters' portions do not always, in their nature, require to be raised at once, or in one entire gross sum; *secondly*, that limiting a trust term as a security for that purpose, upon failure of issue male, cannot be understood to fix the contingency as the time of payment; *thirdly*, that where there is no such time appointed, there will be no interest due for the fortunes, nor consequently any authority to raise them by sale or mortgage.

(M) Lord Cowper's observation on this is, that it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them. 1 Salk. 139. Post, page 81, and note there. See also 1 Ves. jun. 234.

might order the payment thereof at forty years old; the same settlement which provides a large sum, might have provided a small sum; but the parties would have had no right to complain, or, if they did, could not be relieved. In these cases, the deed must determine for itself. It might as well be contended that, in such cases, the trustee might make a lease, for four lives, or for years determinable upon the death of four lives, or that they might make a lease for years reserving less than the old rent, as to say, that under such a trust, they might make a mortgage or sale of the term.

Devise for payment of debts takes case out of statute of fraudulent devises (N).

And, the same observation is applicable to a devise for payment of debts (q); for, by the words and construction of the

(q) *Lingard v. Earl of Derby*, 1 Bro. Ch. Ca. 311. [1 Ves. 522, et infra, 325.—Ed.]

Statute of fraudulent devises.

(N) By the statute for the relief of creditors against fraudulent devises, 3 W. & M. c. 14. s. 2, after reciting that several persons indebted by bond, or other specialty, had, by their last wills and testaments, devised away their estates to the great prejudice of their creditors, it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, &c. or of any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of by his, her, or their last wills and testaments, to be made after the 25th day of March, 1692, shall be deemed and taken only as against such creditor or creditors as aforesaid, his, her, or their heirs, &c. to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect. Before the making of this act, a bond creditor could not at common law recover his debt against the devisee of his debtor. 2 Atk. 291; not even if the debtor bound his heirs and assigns. *Wilson v. Knubley*, 7 East, 128. To remedy this defect, the statute was passed, on the maxim, that a man should be just before he is generous. See also ante, 16 a.

Consequence and qualification of law in text.

An opinion appears to have been long entertained, of which the text is an example, that the operation of this statute is confined to the case where a debtor devises away his real estate from his creditors, and leaves them to chance to procure their debts, enriching third persons at their expence. On the authority of this opinion, it has been held, that where a testator makes an express devise to his creditors, or creates a trust for their benefit, there the statute shall not have any effect, however inadequate the trust may be to ensure a complete payment of their demands. *Bath v. Bradford*, 2 Ves. 590. Consequently, where a testator devises the yearly rents and profits of his estate to trustees to pay his debts, no sale or mortgage can be decreed, but the creditors must either be driven to the leisurely remedy of receiving their debts

statute of fraudulent devises, the devising an estate for payment of debts, takes the case out of the statute, and then the debt, standing as it would have done before that statute was made, the creditor can come upon the real estate only in such manner *as the will directs*. Therefore, where one devised his estate to trustees, in trust to pay the *yearly rents* and profits, in discharge of his wife's jointure and his sister's annuity, and in payment of such of his debts and the interest thereof, as his personal estate should fall short of satisfying, and, subject thereto, to pay his brother an annuity of one hundred pounds *per annum*, to continue till after his debts, affecting his lands, should be paid off by the rents and profits of his estate, and, immediately after the payment of his debts, then two hundred pounds *per annum*, in lieu of the one hundred pounds, and an additional annuity of fifty pounds to his sister; and as to the residue of the rents and profits, gave them over; it was held, that there could be no sale or mortgage, it being the clear intent of the testator, that no part of the land should be aliened for the payment of debts.

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And the law would be the same, if there were ground, from whence it necessarily must be inferred, that portions were meant to be raised by perception of profits (*r*); as if the leasing

Term to cease after portions raised, an inference against power of mortgaging.

(*r*) *Evelyn v. Evelyn*, 2 P. Wms. 659. [See a fuller report of this case, p. 92, 3, *infra*, in note there.—*Ed.*]

year by year as the rents become due, or be obliged to apply to Parliament to procure a sale or mortgage. This is the consequence of the opinion of Lord Loughborough, in the case of *Lingard v. Derby*, the case quoted in the text, and of Lord Hardwicke, in the case of *Bath v. Bradford*, *ubi supra*; but such could never have been the intention of the Legislature, and therefore Lord Thurlow, in the case of *Hughes v. Doulsen*, 2 Bro. Ch. Ca. 114. 2 Cox Ch. Ca. 170, seems to have given the true exposition of this statute. His Lordship's opinion in that case was, that if a devise for payment of debts did not provide for such payment in a practicable manner, it would fall within the spirit and meaning of the act, and be therefore void; and Lord Eldon seems to be of the same opinion in *Bailey v. Ekins*, 7 Ves. 323. Alluding to the case of *Lingard v. Derby*, Lord Thurlow remarked, that if such a case should come before him, he would refer it to the Master to state whether, according to the mode prescribed by the testator, the debts could be paid, and if the Master reported, that the debts could not be paid by that mode, he would consider it as a fraudulent devise, until controuled by the House of Lords.

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power for raising portions were restrained "so as such lease or leases shall cease and determine, when the money shall be raised;" for, such a clause furnishes the strongest argument imaginable, that the settlor did not intend a sale of the premises for the raising of those portions, but only to do it by perception of profits, when even a lease thereof was not to continue after the portions raised, which could not be, if after those sums were raised, and the children paid off, the term was still to subsist for a purchaser or mortgagee; it would not be possible that the term could cease, on raising the portions, in any other sense or way than by raising them out of the growing profits.

Case where debts were raised by sale, and legacies left to be raised out of rents (O).

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And, in the case of *Baines v. Dixon* (s), Lord Hardwicke took a middle course, and raised the debts by sale, and left the legacies to be paid out of the annual profits. In this case one devised his estates to trustees, and their heirs in trust, for paying his funeral expences, debts, and legacies, as far as the personal estate should be deficient, then for raising a maintenance and education for his children until they attained certain ages, then all the surplus as should arise from the rents and profits to and among his daughters, and all his other younger children as should be living, at their respective ages of twenty-one, and that his trustees should convey his estate to his son at twenty-three; he then gave some legacies to be paid after the debts with all convenience, as the profits of the estate

(s) 1 Ves. 41.

When legacies coupled with debts may be raised by mortgage.

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(O) Lord Somers, in his notes on the case of *Sheldon v. Dormer*, 2 Vern. 310, states, that in that case the estate out of which it was desired to raise the portions, was charged with a sum of money to be raised by the rents and profits, for the payment not only of a portion, but likewise of debts; and in all such cases, his Lordship states himself to be of opinion, that if the sum appointed to be raised cannot be raised by the annual perception of the rents and profits, so as to answer the end for which they were designed, the legacies being coupled with debts, may be raised in the same manner, to comply with the intent of the party, but not so where it is only to satisfy children's portions without debts, when no time is limited and the profits alone are sufficient to discharge them. So far as this extra-judicial opinion proceeds on a compliance with the intention of the parties, it may be good law; but otherwise it is contradicted by the decision of Lord Hardwicke in the case quoted in the text.

should *advance* the money. On a bill brought by the daughter, it was directed at the Rolls that a sufficient part of the real estate should be sold for payment of the debts and legacies unsatisfied; with this part of the decree the defendant, the son, was dissatisfied, and, on an appeal to the Chancellor, his Lordship determined that a middle way was to be taken, and a sale directed for the debts, but the legacies to be paid as the rents and profits should arise; for his Lordship held, that the last clause relating to the legacies was a direction that they should be paid out of the annual profits (P).

However, the value of the estate, and the length of time it would take to raise a sum charged, coupled with the object, might possibly, in some instances, be material, notwithstanding the mode was limited in express terms.

Where mortgage may possibly be decreed against express terms.

But, where a mortgagee had lent money upon an assignment of a term so circumstanced (Q), and had suffered the mortgagor to continue in possession, and to receive the rents and profits, under the clause in the mortgage deed, that it should be lawful for the mortgagor to take the profits without account until default of payment, so that he, by that clause, was in the nature of a tenant at will to the mortgagee (t); it was held, that so much of the profits, as the mortgagor had received, must go towards the payment and sinking of the portions, and that the mortgagee must resort to the mortgagor or his representatives for the mortgage-money and interest; but, as there was a power of leasing, the master was directed to see how far

Mortgagor receiving rents till default, must account, when.

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(t) *Ivy v. Gilbert*, 2 P. Wms. 13. P. C. 462. Et vide 68, ante, note (L). [Decree affirmed, Dom. Proc. 2 Bro. Ed.]

(P) And his Lordship said, that as to the intention—there was not one case in ten where the court had decreed a sale on the words “rents and profits,” that it had been agreeable to the testator’s intention, yet the court had, in aid of a creditor, directed a sale by a kind of discretionary power or ground of law, that rents and profits in a will meant to pass the land itself. 1 Ves. 171. See also as to this latter point, *Hall v. Carter*, 2 Atk. 357. 1 Ib. 550. *Infra*, 90. *Johnson v. Arnold*, 1 Ves. 171; and 2 Ves. & B. 74.

As to intention.

Profits carries fee.

(Q) That is, where a mortgagee had lent money upon an assignment of a term created by the mortgagor, in virtue of a power which authorised a levying of the portion by perception of the profits as they arose only.

the land might have been charged by leasing, and whether any lands were vacant; and the court reserved the consideration, how far the estate should be thereby chargeable.

Power to charge implies power to mortgage, with interest (Q 2).

If a man has power to charge with any sum not exceeding a specific sum mentioned, he may raise the same by mortgage (u); for, he may, notwithstanding, charge it with the given sum, and any lawful rate of interest besides; because the intention, in such case, is to charge the premises with the principal money, and that, of course, carries interest, for nobody would lend the sum charged on such security, if the law were otherwise.

Parties fixing rate of interest, court cannot alter it.

But if the party entitled to charge or to give interest from the time the fund is to be productive, fixes the rate of interest, the Court of Chancery cannot controul or diminish it (x).

Power must be recited, or taken notice of.

Persons authorized to raise money upon land by virtue of powers, will not be considered as having acted in execution of such power, unless it be so stated in the mortgage deed, or be a necessary inference from the *res gestæ* between the parties; nor will a court of Equity relieve the mortgagee, if this be neglected. Therefore, where there was tenant for life, remainder in tail, remainder over, under a settlement, with power to tenant for life by deed in writing to charge the estates

(u) *Lord Kilmury v. Geery*, 2 Salk. 538. 1 Eq. Ca. Abr. 341. c. 4. *Earl of Bath v. Earl of Bradford*, 2 Ves. 587. *Evelyn v. Evelyn*, 3 P. Wms. 591. 659. As applied, 2 Atk. 359. *Boycott v. Cotton*, 1 Atk. 552. *Lewis v. Freke*, 2 Ves. jun. 507. [Et vide

Sitwell v. Bernard, 6 Ves. 520. *Angerstein v. Martin*, 1 Turn. 232. *Hewett v. Morris*, *ibid.* 241.—Ed.]

(x) *Guillam v. Holland*, 2 Atk. 343, et 2 Ves. jun. 512. [Et vide ante, p. 67, note (K).—Ed.]

(Q 2) *S. P. Roe v. Fogson*, 2 Madd. Rep. 457, citing *Lewis v. Freke*, 2 Ves. jun. 507. It was argued by Sir Samuel Romilly in one case, that a trust to lay out money on "good security" would not authorise a loan on mortgage, 2 Meriv. 498; but this doctrine may be fairly questioned. It is however observable, that where infants are concerned, the court will not order a reference to the Master whether it would be advantageous to lay out the money on mortgage, but will pursue the usual course of directing the money to be invested in the 3 per cents. *Norbury v. Norbury*, 4 Madd. 191.

in settlement with 2000%, and the tenant for life, and the remainder-man in tail, *without reciting the power*, conveyed the lands in fee by way of mortgage; it was held in Chancery (y), that the tenant in tail, joining with the tenant for life in the conveyance, and not reciting the power, it could not be taken to be a conveyance in execution of the power, but as owner (R).

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(y) *Jenkins v. Kemys*, 1 Lev. 150. 237. S. L. Hard. 395. 1 Cha. Ca. 103.

(R) Appointments deviating considerably from the letter of the powers under which they are made, have frequently been supported, and it is more than probable that a court of Equity would at this day, if a clear intention appeared to execute the power, consider such an execution as that in the text a substantial, although a defective execution, and would relieve against the defect in favor of the mortgagee. On this principle, a power to appoint estates to be purchased with money produced by the sale of other estates, was considered as well executed by an appointment operating directly on the original estates, as that, it was said, amounted substantially to the same thing. *Bullock v. Fladgate*, 1 Ves. & B. 471. And it has been held, that in equity an unlimited power to charge an estate will authorize a disposition of the estate itself, in trust to sell and divide the money amongst the objects. *Long v. Long*, 5 Ves. 445; et vide Sug. Pow. 438. 7 Ves. 499. 12 Ves. 206. 4 Dow. 51. 2 Tho. Co. Litt. 589. Butl. Co. Litt. 271 b. n. 1. vii. 2. and *Lewis v. Llewellyn*, 1 Turn. 104. It is merely observable, that consistently with the established rules on the construction of powers, a power to charge cannot well be construed to include a power to give the estate itself. But the converse of that proposition, that a power to grant the land enables a charge of a sum of money on the land, is easily reconcilable, on the maxim *magis continet in se minus*. See *Roberts v. Dixwell*, 2 Eq. Ca. Abr. 688. *Palmer v. Wheeler*, 2 Ball & Beaty, 18.

Supposition that case in text would be supported.

Before we proceed to the consideration of the second division of this chapter, it may be useful to collect into one view the leading distinctions afforded by the numerous cases on this subject.

We have seen, that the natural meaning of the word *profits* is annual profits. If then that word be found alone, it must be taken in its natural and limited sense, unless the particular state of the circumstances requires a different construction. Instead, therefore, of words of restraint, there must be words or circumstances of extension, to make the term *profits* embrace more than the yearly produce; the broad expressions to the contrary, in *Rawlins v. Brotherson*, cited 2 Ves. jun. 481. (see in opposition *Lingard v. Derby*, 1 Bro. Ch. Ca. 311. and 1 Ves. 522.) and in *Shrewsbury v. Shrewsbury*, 1 Ves. jun. 234, being either not law, or applicable only to the case of a will having other circumstances entitling them to greater latitude. Et vide 1 Atk. 506. If a portion be directed to be raised by a given time out of the rents and profits of an estate, unless annual rents and profits are mentioned, or distinctly appear as exclusively intended to satisfy the charge, the land itself may be

Of the word "profits."

Secondly, as to the time at which money, provided for portions, may be raised by mortgage or sale.

mortgaged, but if no time for payment be appointed, a mortgage will not be decreed, though the portion may be vested, but it will be left to be raised out of the rents as they accrue. Nor will a mortgage be decreed, if there be a power of satisfying the charge by another mode, as if there be a power to lease the premises; and the directing a gross sum to be raised by way of portion will not alter the case, for neither the word "portion," nor a direction to raise the sum in gross, necessarily imports that it shall be raised at once by mortgage or otherwise; for it may be raised out of the rents and profits, and so laid up till it amounts to that sum. *Okenden v. Okenden*, 1 Atk. 551; et vide 2 P. Wms. 666. But where a term is limited to raise portions by rents and profits for younger children, the heir, it seems, may insist on having the portions raised by sale or mortgage, though the younger children object. *Warburton v. Warburton*, 2 Vern. 420.

Where profits
will enable a
mortgage.

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The cases prove, that a mortgage may be made, 1st. Where the annual rents and profits will not satisfy the charge within a convenient and reasonable time. *Talbot v. Shrewsbury*, Prec. Ch. 395. Ib. 437. *Heycock v. Heycock*, 1 Vern. 256. 2d. Where the legacy or portion has been fixed to be paid within a limited time, and the yearly rents of the estate will not be sufficient to raise the whole within that time, as in the case of *Gibson v. Rogers*, Amb. 95, where the legacies were to be paid within one year after the death of the testator. See also *Richards v. Macclesfield* (cited by Mr. Raithby, in his note to 1 Vern. 104.) and *Offley v. Offley*, Pr. in Ch. 27; in which latter case the term was so short that the ordinary profits would not have been sufficient to have raised half the sum intended, and it was allowed to fell timber, and work mines, as against the heir, in order that the daughters' portions might be raised. 3d. Where it is in aid of a creditor, as in *Baines v. Dixon*, 1 Ves. 42. et vide 2 Atk. 105. And, 4th. Where the object of the trust necessarily requires it, as where fines and fees of renewal are directed to be raised out of rents and profits, and then, whenever the occasion for renewal arises, and a given sum can be agreed on, it seems absolutely necessary that it should be raised and paid immediately, as those who are to grant the renewal on that payment cannot be expected to wait for a gradual payment out of the annual rents and profits as they arise. *Allen v. Buckhouse*, 2 Ves. & B. 74; et vide *Green v. Belchier*, 1 Atk. 506. *Bootle v. Blundell*, infra, 903.

Where profits
will not enable
a mortgage.

On the other hand, the word "profits" has been confined to its natural and limited signification, 1st. Where it has been accompanied with words of a restrictive meaning, such as "annual," "yearly," or terms of a similar import. *Anon.* 1 Vern. 104. 2d. Where a particular mode of raising the money has been specified; for then that mode cannot be departed from. In a case where the trust of a term was to raise the daughters' portions by the rents and profits, or by making leases for three lives at the ancient rents, it was pointedly asked in the argument—Could he who was disabled to lease for less than the ancient rents, be imagined to be entrusted with a power to mortgage or sell? *Mills v. Banks*, 3 P. Wms. 5. 3d. Where it is obviously the testator's intention that his debts and legacies should be raised out of the yearly rents

All questions as to the time at which portions shall be raised, ultimately resolve themselves into mere inquiries into the intention of the parties, from whom they are derived, at the time of their being provided; and they ought always to be presumed to have been intended to be raised at that period, when the receipt of them will be most beneficial to those for whom they are provided, unless it be shewn that the parties meant otherwise. Upon this principle it is a rule, with respect to contingent terms for raising portions, that, whenever all that is *contingent*, annexed to such terms, has happened, the term shall be considered as commencing, in the nature of a remainder expectant upon the estate for life, which precedes it; and, therefore, a father is taken as dead without issue, whenever the wife is dead by whom he is to have issue (z); the failure of issue male between the parties is tantamount to the decease of the father without issue male of the body of his wife. The term is then considered as vesting in interest, though not to take effect in point of profits until after the death of the father; for, that he must die is certain, though the time when is uncertain; and if the time mentioned for the vesting and payment is come (viz. twenty-one, or marriage, &c.) the term may be mortgaged or sold, though in remainder and not in possession (a): for then is the *equitable* commencement of the term.

Contingent terms vest with vesting of portions, and may then be mortgaged, though in reversion.

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One of the earliest cases we meet with of this description, is that of *Graves v. Mattison* (b), which was determined at

Contingency having happened, term may be

(z) * The term vests in interest, or arises in equity, immediately it ceases to be contingent, whether it shall arise or not, and, therefore, in this respect, the distinction taken by Lord Parker between the cases of *Butler v. Duncombe*, and *Saville v. Saville*, on the ground of all the profits being disposed of, seems of no consequence. See

Staniforth v. Staniforth, 3 Cha. Rep. 201. et infra, 76.

(a) 3 Cha. Rep. 819.

(b) Sir T. Jones Rep. 201. 1 Eq. Ca. Abr. 336, pl. 1. East. 34 Car. 2. N.B. No objection because out of rents and profits. [See also *Adams v. Danners*, 9 Mod. 486. *Ashton v. ———*, 10 Mod. 401.—Ed.]

* Term vests, when.

of the trust estate, without a sale of any part thereof, as in *Small v. Wing*, 3 Bro. Par. Ca. 503. 5 Tomlin's ed. 66. And, 4th. Where the words "rents, issues, and profits," stand by themselves, as in *Ivy v. Gilbert*, 2 P. Wms. 19, confirmed by the present Lord Chancellor, in *Bell v. Mitchelson*, Suppl. Ves. sen. Rep. 231.

applied for raising portions or maintenance, although one parent alive.

common law: there A. made a settlement to the use of himself for life, remainder to the use of his first son in tail male, remainder to trustees for forty years, remainder to himself in fee. The term was declared to be in trust, that, in case it should happen that the said A. should *die without issue male of his body*, BEGOTTEN ON HIS WIFE, then the trustees should raise certain given sums for daughters portions, payable at the age of twenty-one, or marriage, with a provision for maintenance in the mean time. The wife died, leaving two daughters and no issue male. And it was resolved by Lord Chief Justice Pemberton, and Dolben and Raymond, Justices, that the right to the portions was vested by the mother's death without issue male in the life of the father; for, otherwise the father might live so long, that they might be of little service; and that the trustees, after the death of the mother, and in the life of the father, might sell their interest in the term (although it could not take effect in possession in them, or their vendee during the life of the father) to raise maintenance, or for payment of the portions, if any of the daughters attained the age of twenty-one, or were married in his life-time (s).

If on the whole deed that appears to be the intent.

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And in the case of *Gerard v. Gerard* (c), where A. upon his marriage with B. settled an estate to the use of himself for life, and then to his lady for life, and so to his first and other sons in tail, and if he should die without issue male, having one or more daughters, then to the use of trustees for five hundred years, upon trust to raise 5000*l.* for such daughter, if but one, at her age of twenty-one years, or day of marriage, which should first happen after the decease of the said A. and B. or within six months after either of those days or times, so as, that, if such marriage was had in the life-time of her parents

(c) 2 Freem. 271. 2 Vern. 438. 190. Vide *Staniforth v. Staniforth*, Hil. 1703. Approved by Lord Cowper, in *Corbett v. Maidwell*, 3 Ch. Rep. 2 Vern. 460. *infra*, 76. S. L. and *Sandys v. Sandys*, 1 P. Wms. 707.

(S) This case has, at different times, been the subject of much animadversion; and in *Reresby v. Newland*, 2 P. Wms. 93, it was said by the Chancellor to be a strange decision, and not common sense; but no doubt seems now to be entertained as to its authority. Jones only was dissentient; and the case appears to have had great weight in the subsequent decisions on this subject.

or grand parents, the same should be had with their consent. A. the father died, the daughter having attained the age of twenty-one in his life-time, and the mother him surviving; and on a bill preferred by the daughter to have her portion raised, it was so decreed; *that* upon the whole of the deed appearing to be the intent: for, it was said, that although the first clause for payment of the portions, had it stood single, had been pretty plain, that it could not have been paid till after the decease of the father and mother, yet, by the subsequent words, it seemed to be intended that it should have been paid in their life-time upon marriage, in case such marriage was had with consent; and, therefore, the words "after the death of the father and mother" were rejected, in order to raise the portion, at the time when, for the conveniency, and to promote a proper match for the daughters in marriage, which is the natural and true use of it, the same ought to be raised (T).

Words "after death of father and mother" rejected.

(T) According to the strict letter of the deed, if the daughter married in the life-time of her mother, she could not have claimed the portion even after the decease of her mother, for it was made payable at twenty-one or marriage, which should first happen after the decease of her surviving parent; consequently her arrival at the age of twenty-one, before the decease of both her father and mother, rendered the contingency impossible to happen, and prevented the rising of her right to the portion. But as it was argued by counsel, and adopted by the court, if the daughter were not to have the portion till after the decease of her mother, it may come too late (as she was then twenty-one) to be of any advantage to her in the way of preferment in marriage, which was one principal object and intent of portions. Hence, therefore, no room was left for necessary implication, or even for presumption, that the parties at all events intended to postpone the sale of the term till after the death of the surviving parent, for the deed was incompatible with itself, and the construction in the text was what appeared on a review of the whole deed most accordant with the intention of the parties. The principle to be deduced from this case is, that where there does not appear to be any indication of an intention to postpone the sale or mortgage of the reversionary term, the same ought immediately to be directed for sale or mortgage, from the time prefixed for payment of the portion, and the vesting of the interest absolutely in the trustees.

Reason and principle of decision in text.

A similar decision appears to have been given in the case of *Shouldham v. Shouldham*, 23d Nov. 3 W. & M. 2 Vern. 321, cited also by the Master of the Rolls in *Evelyn v. Evelyn*, 2 P. Wms. 670. There lands were limited to the father for ninety-nine years, if he should so long live, with remainder to trustees for supporting contingent remainders, with remainder to the wife for life, with remainder to the first and other sons of the marriage in tail male, with remainder in default of issue male to trustees for five hundred years, upon

Term mortgageable in life-time of surviving parent, when.

Term not to be raised till death of survivor of parents, does not prevent portion being raised, living a parent.

With interest.

Rule as to raising portions in life-time of parent out of reversion, right.

In the case of *Staniforth v. Staniforth* (d), decreed at Powis House by the Master of the Rolls, in the third year of the reign of Queen Anne, lands were settled, on the marriage of S. with C. to the use of S. for life, remainder to the heirs male of S. and C. and if it should happen that the said S. and C. departed this life leaving no issue male, then to trustees for two hundred years from the decease of the survivor of the said S. and C. for raising portions for daughters. S. died without issue male, leaving a daughter; and on a question, when the portion should be raised and paid, the Court of Chancery decreed, it should be raised and paid in the life-time of C. (whose jointure covered the estate) with interest from filing the bill, and *that*, although there was no express time limited for payment thereof, and consequently it might be intended to be payable only from the death of the survivor (U).

Lord Camden, when Chancellor, made a similar decision, in the case of *Smith v. Evans* (e), against a purchaser of the reversion, expectant upon such a term. In this case, one, on his marriage, settled an estate of 20*l.* a year on himself and wife, and the issue male of the marriage, then to trustees, for a term of years upon trust, in case he should die without issue male, and leave one or more daughters living at his death, to raise 120*l.* for her or their portion or portions, by leasing, as-

(d) 2 Vern. 460. Vide *Sandys v. Sandys*, 1 P. Wms. 707.

(e) Amb. 633. [Ib. 336.—Ed.]

trust to raise portions for daughters by sale or demise of the premises at the age of twenty-one or marriage, and the mother survived the father who died without issue male, but leaving daughters who attained their age of twenty-one years in the life-time of the mother; and the immediate sale of the reversionary term was decreed, on the ground that the trust was appointed to commence immediately on failure of issue male, and was not made by any words there used to wait for the death of the surviving parent, or any other contingency whatever.

And maintenance.

(U) And as no time was appointed for payment of the portion, the court declared that the daughter was entitled to reasonable maintenance from the death of her father, or at least from such time as the portion might have been raised, not exceeding the interest of such portion. Note, in this case there was no time prefixed for payment, but there was an express power of sale. The daughter also had attained twenty-one, and was married.

signing, or mortgaging. The father died without issue male, leaving a wife and daughters. One then bought the reversion, subject to the widow's estate for life, and to the payment of the portions *after her death*. But, on a bill preferred by the daughters in the life-time of the mother to have the money raised, it was so decreed; his Lordship observing, that the old rule, with respect to raising portions in the life-time of the father or mother, and the authorities founded upon it, were strictly right (x).

The reason upon which these cases are founded is, that, by the death of the mother, the possibility of issue male is extinct; therefore all that is contingent has happened; it is then become impossible that there should be issue male; and as to the father's death, that is not contingent, but must necessarily happen; and when the mother's death has happened, it is then the same thing to say, when the father shall die without issue male by his wife, as to say when the father shall die.

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Reason of the
four foregoing
cases.

And if there be no contingency annexed to a term for providing portions, but the term is vested (y), and the portion payable at a day certain, then, although the term be to arise in reversion, after the death of the father, yet, if the money be made payable at a certain time, as at the age of twenty-one, or marriage, there the money will be decreed to be raised in his

Portions being
vested may be
raised out of
vested rever-
sionary term in
life-time of both
parents.

(X) In this particular case, however, the portion could not have been raised in the life-time of the father, had he survived; for the words of the settlement were "if the said (father) shall die without issue male, and leave one or more daughters living at his death." Although by these words the portions could not have been raised in the father's life-time, yet it was held by Lord Northington, that there was nothing to prevent raising them in the mother's life-time, who was tenant for life under the settlement. As to raising portions in the father's life-time, see post, 81.

Contingent
portion not
raisable in fa-
ther's life-time.

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(Y) In most, if not in all, the instances which the author has quoted, and indeed in all cases where the common mode of limiting terms to trustees for raising portions is introduced, the term is a vested remainder *ab initio*, and not a contingent remainder, although certain contingencies may be annexed to the vesting of the portion. It has been said, that until the term is absolutely vested in possession, the trustees have but an *interesse termini*; this, however, appears to be an inaccurate expression; for the trustees have a vested interest in the term under the statute of Uses.

Term a vested
remainder, and
not an inté-
resse termini.

life-time. It is said in *Freem. Rep.* 272, to have been so decided, in the case of *Lord Tracey*; and the same point was determined in the case of *Heyter v. Jones* (f), where a settlement was made to the husband for life, *remainder to the wife for life*, remainder to the first and other sons in tail male successively, remainder to trustees for two hundred years; and the term was declared to be upon trust that the trustees, after the death of the husband *and* (g) wife, should, out of the profits, raise and pay 4000*l.* for younger children, at the age of twenty-one years, unless the person in remainder should raise and pay the same; and the term was decreed by the Lords Commissssioners to be sold, and the portions to be raised in the life-time of the father and mother. And this decree was afterwards affirmed by their Lordships on a re-hearing, and again upon an appeal to the House of Lords.

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Portions carry
interest from
what time.

And, in such cases (h), there is no injury done to the reversioner by decreeing the money to be raised; because it being *then* payable according to the principles adopted in a court of Equity, it will, though not raised, bear interest (z).

(f) 1 Eq. Ca. Abr. 337, pl. 2. 1 P. Wms. 451. 2 Freem. 272. 3 Ch. Rep. 200. 1 Atk. 358. Et *Staniforth v. Staniforth*, 3 Ch. Rep. 201. *supra*, 76, This was a case where a man came to be relieved against his own deliberate agreement.

(g) Lord Cowper, in *Corbett v. Maidwell*, observed, that the word "*and*" might be construed disjunctively, 3 Ch. Rep. 195.

(h) 1 P. Wms. 480. 702.

Interest on interest.

(Z) And that interest will be turned into principal, and carry interest if it be referred to a Master to compute, but not if the mortgagor has signed an account acknowledging so much to be due for interest, unless there be a new agreement between the parties. *Brown v. Barkham*, 1 P. Wms. 652.

Remarks on
rule respecting
raising portions
out of rever-
sionary terms.

As to the injury done to the reversioner by decreeing the money to be raised by sale or mortgage of the reversionary term in the life-time of the parents, it is curious to observe the almost universal tone of disapprobation which this doctrine has excited, and yet with what pertinacity it has been uniformly adhered to and corroborated by an unbroken chain of decisions. If the reversion might be mortgaged, it is contended it might be eaten up with interest; for if the surviving parent be but forty, he may fairly be supposed to live to double that number of years, viz. eighty or upwards, and an accumulation of interest on interest, for so long a period, would surely run away with the greatest part, if not with the entire reversion. To this doctrine also many

But although the above cases have been constantly admitted as the law of the Court of Chancery, yet some great men have considered them as going too far in favour of the heir, at the expence of the ancestor; and, in respect of the inconveniences attending these determinations, whereby an estate may be eaten up, and devoured with interest (because, if a reversionary term, so circumstanced, may be mortgaged, the portion may in time, by the accumulation of interest, amount to treble the sum intended; besides which the mortgagee may foreclose, and by getting reports of the money due, may make interest principal, as it must be after the report confirmed, and thereby the whole estate be swallowed up) (*h h*) have seized upon any words or word in such settlement, different from former cases, to shew that the portion still remained contingent, or from whence arguments may be drawn, that the intention of the seller was, that the term should not be disposed of until it came into possession to distinguish such cases from those we have mentioned, and make them exceptions to the general rule, whereby they might avoid determining in conformity to those cases which have introduced such plain inconveniences.

Courts reluctantly decree mortgage or sale of reversionary terms.

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The first stand was made by Lord Cowper, in the case of *Corbett v. Maidwell* (i); there A. the father of the plaintiff's

Term vested, but portion contingent till fa-

(*h h*) [1 P. Wms. 453.—*Ed.*]

portion contingent, and remainder so.

(i) Salk. 159. 2 Vern. 640. 655. *Reresby v. Newland*, 2 P. Wms. 93. 3 Ch. Rep. 190. Term vested, but 2 Bro. Par. Ca. 487.

other pernicious consequences are attributed, such as the tearing to pieces of family estates, ruining eldest sons of families, selling off their expectancies, encouraging disobedience in daughters, inciting them to rash and improvident marriages; and, indeed, says Lord Hardwicke, it is hard that a court of Equity should encourage a daughter, just when she comes to fourteen, or perhaps twelve years of age, to say to her father, "Come, I am fit for my portion, pray pay it me, or I will marry, and then I can compel the raising of it by the sale of your estate." But, on the other hand, the inconvenience of a younger child starving for want of his portion, is as great as the injury to the eldest son's estate by raising the small pittance of a portion out of the reversion. Besides, a daughter may wait till her fortune is of no use to her in the way of preferment, if reversionary terms may not be mortgaged or sold in the life-time of the parents. At all events there seems less weight in the argument, from the probable disobedience of children to their parents upon obtaining such an independence in their life-time when their fathers are dead, and the portions are to be raised in the life-time of the joint-resses.

her's death;
therefore not
raisable till
then.

wife, upon his marriage, settled lands to the use of himself for life, remainder to trustees for five hundred years, remainder to the heirs male of the body of his intended wife, and if he should happen to die without issue male of his body by his wife, and there should be one or more daughters of their two bodies, which should be unmarried and unprovided for at the time of his death (A), such daughter (if but one) should have 2000*l.* and 30*l.* *per annum*, issuing out of the profits, till the portion should become due, the portion to be payable at the age of eighteen or day of marriage, and a power for the trustees to raise it by sale or mortgage of the term, or preception of profits. There was but one daughter of this marriage, and no son, and the wife died; and the daughter, being above the age of twenty-one, and married to the plaintiff, the question was, whether the trustees could raise her portion in the lifetime of her father? and, on great consideration, Lord Cowper, admitting the cases and distinctions before stated, said, that, leaving out the superfluous words, and putting in the words which ought to have been inserted, it would stand thus, "in case the father shall happen to die without issue male of the body of his wife, and there shall be a daughter begotten between them, which shall be unmarried or unprovided for at the time of his decease." She was to take by this description, or else she could not have this portion. Now, though the plaintiff's wife could not be then unmarried, yet she might be provided for in her father's life-time, which remained still contingent, because nobody could yet say she would be unprovided for at the time of his decease. But the deed went farther, and said, "*Then*," (B) that was at the time of his decease the said daughter should have 2000*l.* paid for her portion, and in the mean time (that was from failure of issue male until payable) the trustees should, out of the rents, issues, and profits, raise 30*l.* *per annum* for her maintenance, which must

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(A) The words are "unmarried or unpreferred at his death," 2 Vern. 656. creating a contingency incapable of determination till the death of the father; and note, the daughter was married, and the bill for raising the portion was brought by her and her husband.

(B) As to the effect of the word "then" in such cases, see *Beauclerk v. Dormer*, 2 Atk. 311. *Biggs v. Bensley*, 1 Bro. Ch. Ca. 190. *Philpot v. Powis*, ubi infra, 96, and note there.

be after the father's death : for though these words " profits, &c." might be construed by sale or mortgage, where they stood alone in a deed, yet, being there put in contradistinction to mortgage, they must be understood of annual profits only ; and that could not be, unless you would let the maintenances run in upon the father's estate for life ; so that it was plain that the words in the proviso, " if he in his life-time pay, or sufficiently secure to be paid, to such daughter as shall be " unmarried," were there *vitium clareci*, by leaving out these words, " or not provided for," at the time of his decease ; and, if they were inserted, all parts of the deed would be consistent, and this plain and natural construction would arise thereupon, that the father, at any time during his life, by paying her 2000*l.* should defeat the term (c).

But we must carefully distinguish between cases like the preceding, where part of the description of the daughter's was, that they should be unmarried and unprovided for at the time of their father's death, and those where provision only is

Observations on preceding case.

(C) In this case Lord Cowper made two distinctions, first, that though a term be limited to commence after the death of the father, yet if the trust be to raise a portion at eighteen or marriage, without question the daughter shall not wait till the death of the father ; but she may at the age of eighteen or marriage compel a sale of the term ; and, secondly, that if the trust of the term for raising portions be limited to take effect in case of the death of the father without issue male by his wife, and the portion be payable at a fixed time, the term will be saleable in the life-time of the father upon the death of the wife without issue male ; for by the death of the mother the possibility of issue male will be extinct, and therefore all that is contingent will have happened ; for the father's death is not contingent. But his Lordship decided against raising the portion in the father's life-time, because it depended on an event which could not be ascertained until the father's death. See the last note.

Lord Cowper's two rules.

As to maintenance his Lordship held, that it must only have been intended in case the father died without issue male, leaving daughters under eighteen and unmarried, because otherwise, he said, this absurdity would follow, that the daughter would be paid maintenance in the life-time of her father out of the profits of a term, which was not to commence till after his death. He thought, therefore, the case too strong for the court to attempt to get over ; to do it would create great confusion, and it would be to no purpose for parties to make deeds, if arguments from convenience or inconvenience were to prevail to over-rule them.

Maintenance.

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made, in case the father should, in his life-time, prefer the daughters in marriage with portions equivalent to those provided for them by the settlement; and also between cases where the words "rents, issues, and profits," are placed in contradistinction to mortgage and sale, and are applicable to different objects, and where such words are used together and indiscriminately, as pointing out different modes of raising such portions; for, in either of the last-mentioned cases Lord Cowper's reasoning in the case of *Corbett v. Maidwell* does not apply.

Term and portion vested, latter may be raised in father's life-time.

Thus where A. (k), upon his marriage with B., settled his estate to the use of himself for life, remainder to the use of his first and other sons in tail male, remainder to trustees for one thousand years, remainder over; and the trust of the term was declared to be, that in case there should be no issue male of the bodies of the said A. and B. begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be one or more daughter or daughters of the bodies of the said A. and B., then the said daughter or daughters should have, if but one, the sum of 4000*l.* for her portion, and if two or more, the sum of 5000*l.*, equally to be divided between them, at their ages of twenty-one, or day of marriage, which should first happen; and if there should be but one daughter, that then she should have the yearly sum of 100*l.* to be paid her half yearly, by equal portions for her maintenance; and if there should be two or more, then the sum of 100*l.* to be paid them half yearly in equal shares, till their respective portions should be raised and paid; and in case the portions were not paid, that then the trustees, their executors, &c. should, out of the rents or profits, or by mortgage or sale of the premises, or any part thereof during the term, raise and pay the several portions before limited; provided that, if the father should, in his life-time, prefer them in marriage with portions equivalent to those therein limited, or that, after his death, the remainder-man should, upon their marriage, pay them portions equivalent, or that there should be no daughter or daughters who should live to attain the age of twenty-one,

(k) *Hebblethwaite v. Cartwright*, Ca. temp. Talbot, 31.

or be married, that then the term should cease and be void. B. the wife died in her husband's life-time, leaving no issue male, but only three daughters, who were all unmarried (D); and one question was, whether, upon this trust, the daughters portions were to be raised in their father's life-time? And it was held by Lord Talbot that they were; for that the term was vested originally, and the portions were no longer contingent, but, immediately upon the mother's death, became vested (E); and that the option given to the trustees of raising either by rents or profits, or sale or mortgage of the premises, did not warrant an inference (which had been drawn) that the father's death must necessarily precede, since it was impossible for the trustees to raise the portions out of the rents and profits during his life: for, in deeds, it was usual to put in every way which might be made use of; but it did not from thence follow, that the daughters were to wait till the trustees could make their choice which way they should raise their portions; that might be making them wait till their fortunes would be of no service to them; and though the mortgage or sale was to be during the term, which was not to commence in possession till the father's death, yet the portion might well be raised in his life-time, it being no where said, that the portions should not be raised till after such time as the term should take effect in possession. Indeed, had there been no express authority given to the trustees to sell or mortgage, there might have been some difficulty; but since they had the power of doing both, they might use that which would best suit the interest of the daughters. As to the proviso, whereby the term was made void in case the father should, in his life-time, prefer the daughters in marriage with portions equivalent with those provided by the settlement, that had been objected to prove the parties design was, that the portions might not be raised during the father's

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(D) In Reg. Lib. A. 1733. fo. 391. the daughters are stated to be married.

(E) During the life of the father and mother they were contingent by reason of the uncertainty, whether there would be any issue male between them; but, immediately upon the mother's death, they became no longer contingent, but absolutely vested by reason of the death of one of the parties without issue male, which in a court of equity Lord Talbot said was deemed a total failure of issue male between them. For. 33.

life, by reason of the power reserved to him of providing for them in his life-time by portions equivalent ; but, in that respect, this case differed widely from the case of *Corbett v. Maidwell* (l), for there it was part of the description of the daughter that she should be unmarried, or unprovided for at the time of the father's death ; which description gave the father time to perform it during his life for the reason before mentioned ; but this was no such description. And the portions were decreed to be raised with interest from the mother's death, at which time they vested.

A trust is a kind of law to trustee, prohibiting him to act otherwise.

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Again, words pointing out the specific and precise time when money is to be raised, will take a case out of the general rule ; because they imply a negative, that, till then, they shall not be raised, and if such negative words were added, it would be out of the question ; for a declaration of a trust is like the prescribing a law to the trustee, which is to be observed by him implicitly, and therein contains a prohibition to act otherwise than as directed : such an affirmation implies a negative, in the same manner, as declaring the trust of a term, that 3000*l.* be raised, implies, negatively, that no more than 3000*l.* shall be raised ; or as declaring that younger children shall be paid their portions at twenty-one, implies that they shall not be paid before twenty-one.

Term to commence after death of father and mother, on trust to raise portions after commencement of term, portion vested by marriage, but not raiseable till mother's death.

Thus, where, upon the marriage of A. with B. (m), the father of A. covenanted to settle lands in the articles mentioned on A. for life, remainder to B. the intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustees for five hundred years, upon the trust therein mentioned, remainder to the use of the father in fee. The trust of the term was declared, that the trustees should, *from and after the commencement of the term*, raise portions for the younger children of the marriage, *viz.* if but one younger child, then 3000*l.* ; if more, 4000*l.* to be raised by the rents and profits, or by sale, demise, or mortgage, *and payable at twenty-one or marriage.* The marriage took effect,

(l) *Supra*, 80.

448. 2 Vern. 760. 10 Mod. 433. 1 Eq.

(m) *Eutler v. Duncombe*, 1 P. Wms.

Ca. Abr. 359.

and there was one daughter (F). Then A. the husband died, and his father settled the estates on his daughter-in-law B. for life, remainder to trustees for five hundred years, the reversion to himself in fee. The trust of the five hundred years term was, that the trustees should, from and after commencement of the term, by rents or profits, sale, demise, or mortgage, raise 3000*l.* to be paid to the daughter at her age of twenty-one, or marriage, but there was no provision for maintenance. And on a bill filed by the daughter and her husband (she being under age) for the portion, the question was, whether it was then payable, or whether it must wait until the death of the parent, the mother, who was then but forty-three years of age? And it was held by Lord Chancellor Parker, that it should be raised *prout* the deed, namely, *after the commencement of the term in possession*: for that the declaring, by the trust of the term, the portion should be raised after the commencement of the term, implied a negative that it should not be raised before (G).

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But, in the preceding case, Lord Parker took a middle way; though he refused to raise the portion before the term came

(F) Who, it was admitted, came under the description of a younger child. *Younger children.* Indeed an eldest daughter, and every one but the heir or person who takes the estate, is in equity considered as a younger child; but that character must continue up to the time of payment to entitle a child to a share of the portion. *Beale v. Beale*, 1 P. Wms. 244. *Savage v. Carroll*, 1 Ball & Beat. 277; and see *Matthams v. Paul*, 2 Jno. Wils. 64. As to a daughter being considered as an eldest son, see *Northumberland v. Egremont*, 1 Eden, 435. The daughter, in the case in the text, married the plaintiff, a tradesman, at the age of fifteen, in the life-time and without the consent of her mother, who was the surviving parent.

(G) And it was accordingly decreed, that the portion should not be raised in the life-time of the jointress, nor bear interest till the commencement of the term. On the rehearing, however, Lord Parker (who was afterwards created Earl of Macclesfield) decreed the husband might sell and dispose of a moiety as he thought fit, the wife being in court and consenting; but this decree appears to have been made by consent between the parties. 6 Ves. 385. This case was afterwards cited in *Brome v. Berkley*, post, 86; and it was there admitted, that if in the declaration of trusts the intention of the party appeared to be that the portion should be postponed to the commencement of the term in possession, it should not be raised, although the time prefixed for payment had arrived.

[85 *]
Decree and observations.

into possession, he made the reversionary term a security for the principal sum.

Butler v. Duncombe, and Saville v. Saville, distinguished.

[86]

Lord Parker distinguished the case of *Butler v. Duncombe* from the case of *Saville v. Saville* (n); which was argued the same term, and where, upon the marriage of A. with the daughter of B., a rent-charge was settled upon her for her jointure, and a term of ninety-nine years was limited, to commence after the death of A. her husband, determinable upon the death of his then intended wife, in trust, the better to secure her this rent-charge, with remainder of the lands, thus charged, to the first, &c. son of the marriage, with remainder to trustees for five hundred years, to raise portions for daughters, if no male issue, the portions to be paid at the age of sixteen, or marriage, which should first happen; in which case his Lordship allowed that this five hundred years term for portions took place in equity from the death of A., the ninety-nine years term being raised for a particular purpose only; namely, for securing the rent-charge, and subject to that trust, which extended only to part of the profits; whereas, in the case then in question (*Butler and Duncombe's case*), the whole profits of the estates were disposed of until the commencement of the term to the mother for life, which distinguished it from the case of *Saville v. Saville*. But Lord Hardwicke observes, in a subsequent case, that Lord Macclesfield founded his decree upon the single words, "from and after the commencement of the term;" and indeed the latter ground of distinction between a case, where the whole profits are settled in jointure, and a case where only part of them are so settled, seems not to be of great weight; for the same circumstance occurred in the cases of *Heyter v. Jones*; *Staniforth v. Staniforth*; and *Smith v. Evans* (o).

But necessary inference, furnished from the circumstances of the case, being inconsistent with the design of raising the portions, before the term comes into possession, is sufficient to distinguish a case out of the general rule to which we have before alluded.

(n) Cited 1 P. Wms. 456. S. C. 2 Atk. 458.

(o) Vide *supra*, 77, 78.

Thus, where lands were settled on the marriage of A. (p), in the usual form, with a remainder to trustees, and their heirs in trust, that, if the said A. should have no son by the marriage, or if, having sons, they should all die before twenty-one, without issue, then the trustees should, out of the rents and profits of the premises, or by sale or leasing, or otherwise, raise for the daughters of this marriage, if but one, 2500*l.* payable at twenty-one, or marriage, which should first happen; and should also raise and pay the yearly sum of 100*l.* by half-yearly payments for her maintenance and education, until her said portion should be due, *the first payment of the maintenance money to be made at such of the said half-yearly feasts, as should next happen after the estate so limited to the trustees as aforesaid should take effect in possession*, together with farther provisions if there should be more daughters than one; particularly if more than three, that the trustees, &c. should stand seised of the premises for the benefit of all and every of the daughters, to be divided amongst them equally, as tenants in common, and of their respective heirs and assigns for ever. The husband died, having left no issue male by the marriage, and but one daughter, who, being twenty-one, filed her bill in the life-time of her mother (who had her jointure on the premises) against the trustees, for the raising of this portion by sale or mortgage of their reversionary trust estate, and also with interest from the time the same became payable; but the bill was dismissed by Lord Macclesfield, on a hearing before him and the Master of the Rolls, upon the ground, that all contingencies had not happened since the estates for life must all determine before the portion could or ought to be raised. The court admitted that the intention, as to the manner of raising the portion ought to prevail; but here the intention was plain, from the fact, that the maintenance for the daughter was not to be paid until *the trust estate, chargeable with the portion, took effect in possession*, and the payment of the maintenance must be intended to precede the payment of the portion. The maintenance must determine when the portion be-

Portion refused in mother's life-time, though daughter twenty-one, because maintenance, which naturally precedes portion, was not to be raised till term was in possession.

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(p) *Brome v. Berkley*, 2 P. Wms. 485. 3 Bro. Parl. Ca. 437.—[1 Eq. Ca. Abr. 340, pl. 7,—Ed.]

came payable, and this was the plainest indication imaginable that the parties intended the portions should not be paid until the trust estate came into possession, which made this a stronger case than that of *Butler v. Duncombe*; and this decree was affirmed on appeal to the House of Lords.

Same in father's life-time, and for same reason.

The principles laid down by Lord Parker, in the case of *Brome v. Berkley*, were followed up by Lord Hardwicke (whose general inclination was against raising portions in the father's life-time) in that of *Stevens v. Dethick* (q). There a question arose upon a settlement made on the marriage of the defendant; the first limitation of which was to the defendant for life, without impeachment of waste; then to trustees, to preserve contingent uses, remainder to his wife for life, remainder to the first and every other son of the defendant's body; and in default of issue male, then remainder to trustees for a term of five hundred years, upon trust that, if there should be one or more daughters, the trustees, their executors, or administrators, should, out of the yearly or other rents, issues, and profits, by sale, lease, or mortgage of the said manors, messuages, lands, &c. or any part thereof, comprised within the said term, raise and pay unto such daughter or daughters the sum of 2000*l.* for her or their portion or portions, to be paid to such only daughter (if there was but one) at her age of twenty-one, or day of marriage, which should first happen; and if they all died before their portions became due, then the said payments to cease, as to their executors and administrators, and to sink into the estate for the benefit of the person to whom the reversion should belong; and also, that such daughter or daughters should have out of the premises, comprised in the term of five hundred years, such yearly maintenance as was suitable to their dignity and quality, and that the residue of the rents, issues, and profits, above such yearly maintenance, should, *in the mean time*, till the portions became payable, be received by such persons as should be entitled to the reversion *immediately expectant upon the determination of the said term*. The mother died, and left no other issue but

(q) 3 Atk. 40.

a daughter, who was married. The bill was brought by the husband and the daughter against the father and the trustees, to raise the portion immediately. Lord Hardwicke observing, that the grounds on which the portion was refused to be raised in the case of *Brome v. Berkley*, both in the court of Chancery and House of Lords, were, that maintenance being given, *and by the very terms of the trust to precede the portion, and not to be raised, till the term took effect in possession, à fortiori,* the portion was not due and payable till then. Apply that to this case. The trustees of the term were, out of the yearly or other rents, issues, and profits, or by sale, lease, or mortgage of the said manors, &c. to raise and pay unto such daughter, &c. the sum of 2000*l.* for her and their portion, &c.; and also such daughter or daughters were to have, out of the premises, comprised in the term of five hundred years, such yearly maintenance as was suitable to their degree and quality; and the residue of the rents and profits above such yearly maintenance, was, in the mean time, till the portions became payable, to be received by such persons, &c. This was the same case as that of *Brome v. Berkley*, only that there it was prayed to be raised in the life-time of the mother; here, in the life-time of the father, which, if any thing, was more unfavourable. The maintenance then was to be raised out of the rents and profits, after the first quarter-day, when the term *should take effect in possession*; here the words, *in the mean time*, were words of relation, and referred not only to a time that was to begin, but to a time which was also to end; but of what rents, issues, and profits could the trustees then receive any thing? Could they bring ejectments? No, for they could not enter to raise the money out of the profits till after the death of the father. His Lordship was of opinion, that the father might have sold the reversion subject to this term; which shewed that the whole trust of the term was to take effect after the death of the father. By the same argument as had been made use of for raising the portion, the maintenance might have been raised in the life-time of the father as well as the portion; but it was the subsequent words that confined it to the time, if the terms take effect in possession. It was said that, in the case of *Brome v. Berkley*, there were the words "*take effect in possession,*" and no such words here; but those words

Portion postponed till term in possession.

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were made use of there only to shew that maintenance could not be raised in the life-time of the mother. The same argument would hold as strong here; for though the words were not exactly the same, yet they were of equal force, namely, "*immediately expectant upon the determination of the term.*"

There ought to be stronger circumstances in a will than in a settlement.

But Lord Hardwicke, in the last-mentioned case of *Stevens v. Dethick*, seemed to think that stronger circumstances were necessary to shew that portions were not to be raised until the term for securing them came into possession, where the claim arose under a will, than where it arose under a settlement; and his Lordship urged that as one ground for distinguishing between that case and the case of *Hall v. Carter* (r), decided by him at a prior period of time.

Portion not postponed, merely to give trustees an election.

The circumstance of its being directed (s) that a portion shall be raised out of the rents and profits, or by mortgage, is not a reason why it should wait till the term comes into possession, in order that the trustees may make their election; indeed this ground was taken in argument in the cases of *Brome v. Berkeley*, and *Hall v. Carter*, but was over-ruled by Lord Hardwicke in the latter case, his Lordship observing, that there were many cases of settlements where this election was given to trustees, and yet they had not been allowed to postpone the raising, in order to make their election only (H).

(r) *Infra*, 89.

(s) *Sandys v. Sandys*, 1 P. Wms. 707.

Share of term sold, time for payment having arrived.

(H) In this case of *Sandys v. Sandys*, *ubi supra*, the trust declared of the reversionary term was not confined to raising the portions by rents and profits, but it was expressly directed that it might be raised by sale or mortgage; and a time was fixed for payment of the portion, namely, twenty-one or marriage. There was issue four daughters, and no son. After the death of the wife, the eldest daughter having married, her husband brought a bill to have one fourth of the sum mentioned in the settlement raised immediately by sale or mortgage. Lord Macclesfield reluctantly decreed a fourth part of the term to be sold, observing at the same time, that though this was a matter of trust, yet since all the contingencies had happened, and nothing remained to suspend the execution of the trust, it did not evidently appear but that the parties intended the portions to be raised out of the reversionary term; therefore he did not look upon it as within the discretion of the court any more than in the option of the trustees, whether they should or should not be raised; but it was a thing not to be encouraged.

There A. by his will (*t*), created a term of one hundred years, in trust, out of the rents and profits of the premises, or by mortgage thereof, to raise portions of 100%. for each of the daughters of his son B. payable at eighteen, or day of marriage; and moreover to pay to every such daughter or daughters the sum of 6*l.* a year for their maintenance, till their respective portions should become due and payable; with a proviso, that it should be lawful for his son B. to make a jointure to such woman as he should marry, of *all* or any part of the premises limited to him, and in case of failure of issue male of B., the like limitation to his two other sons; with a proviso, that, in case such person or persons as should be next in remainder or reversion, expectant upon the said term of one hundred years, should and would pay unto such daughter or daughters of the said B. or their guardian, or to such person as should be lawfully authorized to receive the same, all and every of their respective portions of 100%. a piece, either before or after the same were due and payable, by the direction of his will; that then the said term of one hundred years should, from thenceforth, cease and determine for the benefit of such person or persons, in remainder or reversion as aforesaid. B. had daughters, but no son, and *died*, leaving his widow, who had a jointure of the whole estates devised under the will. And the question was, whether the daughters' portions should be raised, in the life-time of the mother, by mortgage of the reversionary estate? And Lord Hardwicke determined that they should be raised immediately. And his Lordship distinguished this case from that of *Brome v. Berkeley* (*u*), upon the ground, that in the latter case, the daughter was not entitled to have any maintenance till the term took effect in possession, but in the present case, it was far otherwise (*x*); for the maintenance was actually a charge upon the estate, and the trustees were to pay 6*l.* *per annum* to each daughter till their portions respectively became due and payable, and was not postponed until after the term came into

If maintenance be not postponed till term is in possession, portion may be raised in life-time of jointress.

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(*t*) *Hall v. Carter*, 2 Atk. 353.

(*u*) *Supra*, 86.

(*x*) Lord Macclesfield thought this no reason, because, if so, then in-

terest might, by foreclosure, be got upon interest.—[As to this, see ante, 79, note (Z).—*Ed.*]

*As to arrears
of maintenance.*

[91]

*Other provi-
sions, furnish
no ground to
suspend por-
tions.*

*Portion to be
paid at eighteen
or marriage, or
as soon after as
convenient.—
Sale of rever-
sionary term in
father's life-
time, inconve-
nient.*

possession, so that maintenance run on till then. And though he did not know any instance, where a sale had been directed for maintenance out of rents and profits (because it must be annual, which would create endless trouble,) yet it was a charge upon the estate, and the arrear which was incurred must be paid off after it came into possession. Then where could be the objection of mortgaging the reversion then, or what harm could it be to the reversioner? Because, the moment the term came into possession, the arrears of the maintenance must be satisfied. As to the objection, that the portion being directed to be raised out of rents or profits, or by mortgage, therefore it ought to wait till the term came into possession, that trustees might make their election, this was the argument in *Brome v. Berkley*; but there were many cases of settlements where this election was given to trustees, and yet they were not allowed to postpone the raising, in order to make their election only. And his Lordship said he was not clear whether it might not be raised by sale, if it had stood only upon the words "*rents and profits*," which had been held to carry a fee.

Although children, who claim portions so circumstanced, are entitled to other provisions, they shall, notwithstanding, have their portions raised when payable; for that circumstance does not furnish any ground to suspend the raising them; because, if they have a right to portions by the settlement, they ought not to lose that right by having a farther provision.

In the case of *Reresby v. Newland* (y), Lord Macclesfield laid some stress on the words "to be raised by rents and profits, or by sale, or mortgage, and paid at the daughter's attaining the age of eighteen, or marriage, or within as short a time after as the same should or might be conveniently raised (1);"

(y) 2 P. Wms. 95. [Decree affirmed, Dom. Proc. 2 Bro. Par. Ca. 487.—Ed.]

Words of trust.

(1) The words were, "or within as short a time after as the same should or might be conveniently raised, the elder of the daughters to be first paid, and for the yearly maintenance of such daughter or daughters, until her or their portion or portions should or might be raised as aforesaid, if there should be but one, the yearly sum of 50*l.* and if two or more, the yearly sum of 35*l.* a piece,

observing, that, in his opinion, it could not be conveniently raised by selling a reversion, which would incommode the family to that degree as to ruin the estate; for which reason he thought that it could not be conveniently raised until the death of the father. But his Lordship was of opinion, in the case of *Trafford v. Ashton* (y y), where the tenants for life were dead, and the question was between the remainder-man, a remote relation, and the daughters of the settlor, whether the trustees might sell or mortgage a term, the trusts of which were declared to be, that if the settlor should die without issue male of the said marriage, and should leave one or more daughters, then the trustees should, out of the rents and profits, raise 8000*l.* for the daughters of that marriage, to be paid to them as soon as conveniently could be, without limiting any express time when the portions were payable, that the portions were presently payable; for the daughters being twenty-one at their father's death (who survived their mother), and marriageable, it was then convenient that they should have their portions (x).

And the words, which direct the payment of the portion at twenty-one, or marriage, do not at all militate against the construction last alluded to in favour of the heir or reversioner, where, from the words in the instrument, there is no room to admit it; because, such words, *nevertheless*, have their effect, for they vest a right in the portion in the child, when it attains that age, or the event referred to arrives, and, thereupon, the portion, in case of the death of the party entitled to it, becomes transferable to executors or administrators, as a vested interest.

[92]
Portion may be vested at twenty-one, though not then payable.

(y y) [Ante, p. 63.—Ed.]

to be paid to such daughter or daughters upon Michaelmas-day and Lady-day, the first payment thereof to begin upon such of the said feasts as should first happen next after the death of the father, *it being the true intent and meaning of the parties, that no yearly maintenance should be due to or raised for any such daughter or daughters during the life of the father.*" Mr. Cox's note, S. C. 2 Eq. Ca. Abr. 644, pl. 15.

(K) In the case of *Warr v. Warr*, Prec. in Ch. 213, where the power was for raising portions at such convenient time as the trustees should appoint,

Equity will not supply provision for maintenance, to prevent above construction.

Nor will the objection (s), that the settlement does not provide maintenance until the portion is payable, be of any weight to prevent the above construction, for there is no reason that equity should supply that, any more than that it should supply the want of a portion, if none were provided. In truth, this may be industriously omitted by a settlement, as intending to leave the child to depend upon the mother, who, by the law of the land, and of nature, is bound to provide for it.

No time fixed for payment of portion, it can be raised by rents only.

But where no particular time is mentioned for the payment of portions, though the same are secured by a term, and directed to be paid out of the rents, issues, and profits of the premises comprised in the term, courts of equity (who use a discretionary power in such cases, if the children to take be of tender years, although the events have happened on which they are to vest) will not raise them by sale or mortgage, but will leave them to be paid out of the profits as they accrue; considering these as cases of portions to be raised by perception of profits *without interest*, and, therefore, not due until produced thereby: the cases of *Evelyn v. Evelyn*, and of *The Earl of Rivers v. The Earl of Derby*, fall under this distinction (a) (L).

(z) 1 P. Wms. 454.

(a) 2 P. Wms. 660. 671. 2 Vern. 72.

and they died without making any appointment; the Master of the Rolls supplied the omission, on a bill brought for that purpose, by limiting a reasonable time.

(L) The cases of *Evelyn v. Evelyn*, and *Rivers v. Derby*, are material to the point under consideration, and are therefore worthy of further notice.

A. having power to lease, (leases to cease when portions raised) demised to B. for 500 years, in trust, by sale or mortgage, to raise portions. B. cannot mortgage, and portions raiseable by rents only.

In *Evelyn v. Evelyn*, 2 P. Wms. 661. 14 Vin. 240, pl. 11, George E. the father, and John E. his eldest son, settled by recovery certain entailed estates, in strict settlement, with a power for the sons of George E. the father, when in possession, to make leases *sans waste*, for the raising portions for daughters, so as the portions did not exceed the fortunes in money, goods, or chattels of the wives whom such sons, making such lease, should marry; and so as such lease should not take effect till there should be a failure of issue male of the body of such sons so making the lease.—Fee simple lands were also settled on the same uses, and with the same power of portioning, except that a restriction was added to such power, in these words, “so as such lease or leases be determinable on raising such portions, and the costs and charges thereof.”

The father and eldest son died, and George E., the second son, being seised of both estates, on his marriage with M. G. in consideration of her marriage

In the case of *Pierpoint v. Lord Cheney* (b), Lord Macclesfield inclined strongly against raising maintenance by mortgage

Court against raising maintenance by mortgage of reversionary term.

(b) 1 P. Wms. 489. Et vide *Ravenhill v. Dansey*, 2 P. Wms. 180. *infra*, 133.

portion of 8000*l.* and for making a suitable provision for the daughters of that marriage, granted and demised the same estates to trustees for a term of 500 years, *sans waste*, to commence and take effect from and after failure of issue male of the body of the said George E. (but subject to the jointure of his intended wife) at the yearly rent of one pepper-corn, if demanded, Upon Trust, if there should be failure of issue male of the body of the said lastly mentioned George E. and he should have one or more daughter or daughters, that then the said trustees, or the survivor, &c. should, out of the rents and profits of the premises limited to them for the said 500 years, by sale, mortgage, or lease of the said term or part thereof, or by any other means they should think fit, as soon as conveniently might be after the decease of the said George E. the party, or in his life-time if he should think fit to have the same sooner raised, and should so direct, raise the sum of 8000*l.* for the portion or portions of such daughter or daughters, equally to be divided between them; after the raising and paying of which with the costs, the term should cease.

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The marriage took effect, and in 1724, George E. the son, died intestate, leaving his wife, and three daughters of very tender age, the eldest not being more than three years old, and a large personal estate. The daughters brought their bill against the remainder-man in tail, to have their portions raised immediately, with interest from the death of their father, by sale of the said term of 500 years. The question made by the court was, whether the sum of 8000*l.* was to be raised by an immediate sale or mortgage of the term of 500 years, or only by a gradual perception of the profits as they arose annually after the term came into possession. In considering this question, Sir Joseph Jekyll, M. R. said it would be proper to take notice, *first*, of such kinds of powers as that reserved by the present settlement; *secondly*, of the manner of wording this power, as the same stood expressed in both deeds; *thirdly*, of the method of raising the portions of daughters or younger children, where the deed or will under which the same were claimed, did not direct any sale or mortgage expressly, or where the term or interest, created as a fund for that purpose, was not yet come into possession; and *lastly*, collect into one view the result of the whole.

First, as to the nature of such powers, they were to be taken strictly, being to charge, burthen, and encumber the estate of a third person. Such was the remainder-man, the defendant in the present case, and therefore it was as much the donor's intention, that the remainder-man should have his estate subject to no greater incumbrances than the powers expressly warranted, as that the tenant in possession should have the power to subject it to the incumbrances excepted by the power. As to the *second* point, it was necessary to distinguish between the power as originally created by George E. the father, under the old settlement, and the subsequent execution of it by George E. the younger, in his own marriage-settlement, where he had certainly done all that man could do to load the remainder-man; for, though, in directing the

of a reversionary term expectant on the death of the wife, although the maintenance as well as the portion was directed to

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portions to be raised, he made use of the words "as soon as conveniently may be," yet it was plain he thought of nothing less than the remainder-man's convenience, when he appointed the portions to be raised by lease, mortgage, or any other ways and means; and that, after the death, or in the life of the jointress, as should seem meet to the trustees. It could not be pretended, that there were any express words to authorise the raising the portions in question either by lease or mortgage, or by any other way than making leases for years, without impeachment of waste; for the word "portion" did not *ex vi termini* import a gross sum to be raised in a lump, nor money, it might as well be goods and chattels, and might be payable at one or different times.

Thirdly, there were but two ways of raising portions, the first by sale or mortgage, the second by perception of profits. Now where a particular certain time was limited for the payment of the portion, there it carried interest from that time, and implied a power of sale; (see the cases of *Trafford v. Ashton*, ante, 63, and *Key v. Gilbert*, 67, 68,) but in the present instance, no certain time was limited for payment, which very much influenced the present case, and distinguished it from others. The plaintiffs indeed had insisted, that there was a time fixed by the proviso, and that was to be immediately on failure of issue male; but his Honour said, that was not so much to denote the time of payment, as to lay a restraint on this power, by adding very properly such words as might prevent it being carried into execution before the contingency should happen contrary to the intention of the parties; and to infer from thence any immediate time of payment was to conclude by contraries. It was also said, that the time prefixed for this purpose, was as soon as the lease could conveniently be sold, but that was begging the question, for it appeared plainly, that George, the elder, had nothing more at heart than the continuance of his name and estate in the male line of his family, since that was the only motive to engage him to part with the inheritance of his fee-simple lands, and it would be frustrating all the views he had of this kind, to suppose he had still left it in the power of any tenant for life so to clog and incumber the estate, by any act of his, as to leave the inheritance worth perhaps one pepper-corn only to the remainder-man or his posterity; yet this must be the case, should the construction which the plaintiffs contended for take place, as might appear to any one who considered that the raising so large a sum as 8000*l.* by the disposal of this term, would, by charges and growing interest, sink the value of the estate to nothing before the death of the jointress. Could there then be a more reasonable provision than to direct the raising these portions, rather than to leave it in the power of any tenant for life to mangle and defeat all the subsequent remainders? Besides the daughters were young, and if the whole sum were immediately raised by sale or mortgage, both principal and interest might swell it up to double the sum, before they attained their age or were married, which was incompatible with the other provisions of the settlement.

Principle deduced from cases.

His Honour then went into an elaborate discussion of the cases, citing nearly the whole that were to be found in the second division of this chapter; and the principle he said which he conceived to be established by the many precedents,

be raised by the trustees, in the settlement in question, either by rents, issues, and profits, or by sale or mortgage; and to be

was, that wherever the estate was settled to the use of the father for life, with remainder to the mother for life, with remainder to the sons of the marriage, and for default of such issue, to trustees for a term of years, to raise portions for daughters, and the father and mother died without issue male, and left issue female, whereby the remainder limited to the trustees, which before was only contingent, was then become absolutely vested, in that case, though during the life of the surviving parent it was only an *interesse termini* [as to this, see page 78, note (Y)] yet it ought to be sold in the life-time of the survivor, if the time fixed for payment were come, unless there were something in the deed very clear to shew the intent of the party, that the term should not be disposed of till it actually fell into possession, and then it should be postponed till the death of both, through directed to be raised by sale or mortgage, and at a time prefixed. His Honour also conceived it to be settled by the case of *Brome v. Berkley*, (page 86, 7, ante,) and several other concurrent resolutions, that wherever there was a plain indication of the intention of the parties to postpone the payment of the portion till the term came into possession, the court would never direct an immediate sale of such term.

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Lastly, Sir J. Jekyll considered the result of the whole to be, that every power of this kind, in general, ought to be construed strictly, but more particularly where it tended to affect a purchaser for a valuable consideration, as the defendant seemed to be in the case in question. In the penning of the power in dispute, there was not one word of either sale or mortgage, nor one single expression in any other part of the whole deed that carried the least implication of any such authority, but on the contrary, it appeared plainly, that no such power could be intended from the express restriction added in the close of the proviso, that "the leases should determine after the sum was raised," which could not possibly have happened; but in the supposition alone of their being raised by the perception of the rents and profits; besides, nothing could be a more plain indication of this intention, than the remarkable difference between this and the other proviso in the same deed for charging the estate with another portion, which was expressly directed to be either way, as well by sale or mortgage as the other, and therefore it was almost impossible to imagine that the parties to that deed should have inserted it in the one and omitted it in the other, if they had not thereby intended a difference between the two powers, and therefore on the whole, he was of opinion, that no sale or mortgage should be decreed, but that the plaintiffs should wait till their fortunes could be raised by a gradual perception of the rents and profits of the lands in question, and it was decreed accordingly. Reg. Lib. A. 1731. From which decree, so far as it related to the raising the daughters' portions, there was an appeal to the House of Lords; but on the 2d May, 1733, the parties on both sides came to an agreement, which agreement was confirmed by an act of parliament. 4 Bro. Par. Ca. 109. See the arguments in Fitzgibbon, 131; and the judgment of Sir Joseph Jekyll, in Mr. Chambers' Report of this case, 1819.

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In the case of *Rivers v. Derby*, 2 Vern. 72, the proviso in the marriage settlement was, that if upon failure of issue male of the marriage, the premises

No mortgage, if
no time limited

paid quarterly, the first payment at such of the four usual feasts as should next happen after the decease of the husband; observing, that he had not been able to find one single precedent for mortgaging a reversion for maintenance.

But otherwise decreed in Lord Herbert's case;

But, in the report of the case of *Pierpoint v. Lord Cheney* (c), one of the counsel cited a case of Lord Herbert, decreed by the Master of the Rolls, wherein the late Lord Herbert gave his real estate to his nephew, subject to a term for years, which was declared to be upon trust by sale or mortgage, or with the profits, to raise 3000*l.* a-piece for his two sisters, and 100*l.* *per annum*, maintenance money; and the estate happened to be so incumbered with jointures and rent charges, that there was not enough to pay the maintenance; whereupon the court decreed a mortgage of the term to raise it.

and where children were otherwise unprovided for.

And Lord Macclésfield himself, afterwards, decreed in a case wherein, otherwise, the children must have been left unprovided for *by the settlement*, that maintenance should be raised by the mortgage of a reversionary term *vested in interest*.

Same.

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In the case lastly alluded to (d), there was a term of 500 years limited to trustees, to raise portions for daughters in case of no issue male by the marriage. The trustees of the term were to raise 2000*l.* a-piece for the daughters of the marriage, payable at their ages of eighteen, with maintenance money at the rate of 40*l.* *per annum* to each daughter *from* the deaths

(c) 1 P. Wms. 490. [Et vide *Lydon v. Lydon*, cited the latter end of next note.—Ed.] (d) *Ravenhill v. Dansey*, 2 P. Wms. 180.

for payment of portion.

should go over to any of the subsequent remainder-men; and if there should be a daughter of the marriage then living, then the trustees should stand seised of the premises, to the intent that such daughter should receive the sum of 10,000*l.* out of the rents, revenues, and profits thereof: the daughter died at seventeen, and disposed of her portion by will, and the court declared that it was an interest vested in the daughter, and well disposed of by her; and the rather, because there was no time limited for the payment; therefore it was payable as it could be raised out of the issues and profits after the death of the father. See also *Smith v. Smith*, 2 Vern. 92. *Bruen v. Bruen*, Ib. 439. *Hickman v. Anderson*, Ib. 655, and *infra*, 96, n. (M).

of their father and grandfather by the mother's side, until their portions should become payable. The father died leaving two daughters, one eight, and the other nine years old, and the term did not commence in possession until the death of a third person, which happened some time afterwards. The trust of the term was to raise the portions by sale, mortgage, or profits; but the trust to raise the maintenance was, by *Maintenance.* rents and profits, so that there was a difference in the deed, between the manner of raising the portions and that of raising the maintenance. And, upon these facts, it was objected, that the maintenance should not begin until the 500 years term commenced in possession, at which time only the same could be raised by rents and annual profits, *Et per Lord Macclesfield, Chan.* "it is against my opinion to raise a portion or maintenance by selling a reversionary term, under colour of the word *profits*; but it has been ruled before my time, that profits shall extend to any advantage, which shall be made of the land by sale or mortgage, as well as rents; especially in cases of necessity, and when the daughter has had no other maintenance, it has been decreed to be raised by a mortgage of a reversionary interest of a term(e). But the present case is much stronger; for, here the trust term for raising this maintenance and portion is come into possession, so that, at present, the maintenance money must be raised out of the annual profits; it is like a rent granted out of a reversion, to commence presently, in which case, though the reversion does not fall into possession until many years after, yet when it does fall, it shall answer all arrears. So let the arrears of the maintenance money, from the time the same became payable by the settlement, be raised out of this term(M).

(e) *Butler v. Duncombe*, supra, 84. portions. The Lords Commissioners held as above, that "commencement" [Et vide *Churchman v. Harvey*, Amb. 335, where the trust was, that the trustees should at any time after the commencement of the term raise the meant commencement in possession, and implied a negative on its being raised before.—Ed.]

(M) To complete this epitome of the cases, there are four others which it seems necessary to add, and which the author does not appear to have noticed. The first is that of *Conway v. Conway*, 3 Bro. Ch. Ca. 267, in which Lord Thurlow is reported to have said, where a man gives portions, charged on a

Term cannot be mortgaged till in possession. Sed qu.

Mode of preventing foregoing questions.

Before we drop this subject it may be proper to observe,

[97 *]

Reversionary term mortgage-able in life-time of parents.

term to arise upon the death of a party, it shews that they are not to be paid till after the death of that party, and that though it be upon attaining twenty-one or marriage, yet that can only be where the term shall come into existence. This passage stands opposed to all the preceding decisions, and Lord Eldon said, in a subsequent case, *ubi supra*, 6 Ves. 379, that he was quite satisfied Lord Thurlow never did express himself in that manner; and see Lord Colchester's report of Lord Thurlow's judgment, 3 Belt's edition of Bro. Ch. Ca. 270, note (2), which however does not appear to set his Lordship's judgment in a different light.

The second case is that of *Stanley v. Stanley*, 1 Atk. 549, where Lord Hardwicke acknowledged the general rule to be, that if there be a term for years, or other estate limited to trustees for raising portions for daughters, payable at a certain time, which is become a vested interest, they shall not stay till the death of the father and mother, unless some intention appears to postpone them, and if there do, the court will always take notice of such intention, and postpone them accordingly. But, said his Lordship, the later cases, as *Brome v. Berkley*, 2 P. Wms. 484, and others, shewed that the court would lay hold of very small grounds to collect the intention of the parties against raising the portions in the life-time of the father and mother.

Case of articles. Portion not raiseable till father's death.

The third case is that of *Philpot v. Powis*, Trinity Term, 30 & 31 Geo. 2. where the proviso in marriage articles was, that if there should not be any issue male of the marriage living at the death of the survivor of the husband and wife, and they should have one or more daughters, then the trustees of the term of 500 years should, out of the premises, raise any sum not exceeding 2000*l.* for such daughter or daughters, as the husband and wife should jointly appoint; and, in default of appointment, then the sum of 2000*l.* for such daughter or daughters equally, share and share alike, to be paid at their respective ages of twenty-one years, or days of marriage, which should first happen. The marriage took effect, and the wife died in her husband's life-time, leaving a daughter, her only child, who married before her father died. It was contended, for the daughter, that the portion became due on her marriage, though her father were living, her mother being dead without issue male. But Lord Commissioner Smith was of opinion that the daughter's portion did not become due till the death of the surviving parent, and Lord Commissioner Willes or Wilmot (one of them being absent) agreed with him; but delivered his opinion at greater length. After remarking that the old cases were more favorable to the raising of daughters' portions, he proceeded to observe, that this was a question of intention; *the intention was the only guide*; and the intention seemed to him to be, that the daughter's portion should not be raised till the survivor of her father and mother was dead. It was said to be a hardship on the daughter to wait so long; but a contrary construction, his Lordship said, would be a greater hardship on the eldest son, the representative of the family, who was a purchaser under the limitation in tail general, and neither a stranger nor a volunteer; if a bill had been brought for raising the portion in the life-time of the father, it would not have been decreed; the word "then," in the proviso related to the default of issue male,

Daughters less favored where purchasers concerned.

that to prevent questions of the foregoing kind respecting por-

and to the death of the survivor too; wherefore the trustees could not raise the portion till default of issue male, and till the survivor was dead. Lastly, his Lordship observed this was a case of articles in which a more liberal construction was used. In *Stanley v. Stanley*, ubi supra, Lord Hardwicke relied much on its being a case of articles, where the words are often altered; and as this, he said, was a case of articles, and the cases cited were cases of settlements, and the court was desirous of taking hold of any distinction against the construction contended for on the part of the daughter, he thought that sufficient to decree this portion not to be due till the death of the survivor of the husband and wife.

Fourthly, In the case of *Lyon v. The Duke of Chandos*, 3 Atk. 416, it appeared, that previous to the marriage of the Marquis of C. a settlement was made, giving estates for life first to the Duke of C. (the Marquis of C.'s father), then to the Marquis, then to the intended wife in jointure, with remainders over to the issue male of the marriage; and a term was created in default of issue male, in trust, to raise out of the rents and profits, or by sale or mortgage, portions for daughters, to be paid at twenty-one or marriage, the Marquis, their father, being dead. The Marquis died in the lifetime of the Duke, leaving two daughters, but no issue male, and Lord Hardwicke was of opinion that the portion was so clearly ordered to be raised upon the death of the Marquis, that there was no room left for implication, he therefore decreed that it should be raised, with interest, from his death, notwithstanding the Duke was then living. But, said Lord Alvanley, in a subsequent case, (*Clinton v. Seymour*, ubi infra) I confess that is singular, as maintenance could not be raised till after the death of the Duke. Lord Hardwicke, however, thought the trust was so penned that he could not help raising the portions; for the Marquis had clearly the power to raise them by mortgage of the reversionary term; and if he and the Duke had died, it was not controverted that the portions might have been raised in the life-time of the jointress; and this case, he said, differed from *Brome v. Berkley*, because there was no power in that case to raise the portion in the life-time of the jointress; and although it was not usual with conveyancers, and they were extremely cautious of raising portions in the father's life-time, without his consent, yet where there were great estates, it was common to direct, that upon the death of the father, portions should be raised in the life-time of the grandfather, and not to suspend them for two lives. To construe the settlement otherwise, he must insert words, and go by implication where there was an express direction to raise the portions even in the life-time of the father, if he thought fit. From this case we collect, that the suspension of the portion beyond the life-time of the parents, and the survivor of them is not encouraged.

Reversionary term mortgageable in life-time of grandfather and jointress.

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Since the above stated cases, there are not any in the books of reports, in which the question has been the principal object of discussion. In *Clinton v. Seymour*, 4 Ves. 440, and in *Codrington v. Foley*, 6 Ves. 364, the rule was incidentally investigated both by Lord Alvanley and Lord Eldon. The case of *Clinton v. Seymour* arose on a question of maintenance. The trusts of the term in the marriage settlement were declared to be, that in case there should

Court against raising portions or maintenance out of reversionary term; therefore bill for difference

Mode of preventing foreclosing questions.

Before we drop this subject it may be proper to observe,

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Reversionary term mortgage-able in life-time of parents.

term to arise upon the death of a party, it shews that they are not to be paid till after the death of that party, and that though it be upon attaining twenty-one or marriage, yet that can only be where the term shall come into existence. This passage stands opposed to all the preceding decisions, and Lord Eldon said, in a subsequent case, *ubi supra*, 6 Ves. 379, that he was quite satisfied Lord Thurlow never did express himself in that manner; and see Lord Colchester's report of Lord Thurlow's judgment, 3 Belt's edition of Bro. Ch. Ca. 270, note (2), which however does not appear to set his Lordship's judgment in a different light.

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Reversionary term mortgageable in life-time of grandfather and jointress.

[98 *]

Court against raising portions or maintenance out of reversionary term; therefore bill for difference

tions, it is usual in modern settlements to insert a clause, " that

[100 *]
*Reversionary
term not mort-
gageable for
maintenance.
See vide ante,
93.*

their ages of twenty-one years, in case such ages should happen after the death of A. and B., otherwise within six months after the death of the survivor of them. And upon further trust to raise interest at 4 per cent. on the portion for maintenance till the portions became due and payable, with a proviso, that if the remainder-man should pay off the portions, or there should not be any younger children, the term, or so much thereof as should remain unsold or undisposed of, should attend the inheritance. And it was pointedly asked, by the Master of the Rolls—Supposing the rents are not sufficient to provide maintenance, in what way can the term be used for that purpose? The counsel for the plaintiffs replied, by a sale or mortgage, the words being, by any ways or means as the trustees should think fit. But the Master of the Rolls thought it difficult to raise maintenance by sale or mortgage. The eldest son, he said, had contended, that because the portions were not payable, interest was not to be paid during the life-time of the mother, who was then living. But that qualification was not warranted by the words, and would be contrary to the intention. The children are equally in want of maintenance during the life of the mother, as after her death. If, indeed, the estate had been limited to her for her jointure, it might be argued that the limitation for maintenance could not take effect till the term should come into possession. Even in that case it would be doubtful whether these strong and general words would not warrant raising maintenance by sale or mortgage of the reversion, or at least raising it afterwards retrospectively; but where the trustees have the legal right to the rents and profits, and the interest is expressly given for maintenance till the portion becomes due, it would be equally contrary to the words and spirit of the settlement to hold that maintenance should not take place till after the mother's death. In the case of *Hall v. Carter*, Lord Hardwicke laid no stress on words less qualified than these, observing on that will that the intention was, that the daughters should have maintenance till the portions became payable, and not afterwards till they were raised; whence it followed that if it were collected from any part of the will, that maintenance was intended to be paid, mere general expressions in a proviso of this kind, ought not to defeat or counteract that intention. Interest, therefore, was decreed to be paid on the portions during the minority of the children, and in the life-time of the mother.

To this list it is necessary to add a case since decided, where a parent had power to appoint the portion by deed or will. The court said, that whether a portion is or is not to be raised out of a reversionary term, is a question of intention, and inasmuch as the mother had powers in this case to appoint the portion to the younger children by her will, it was plainly the intention of the donor of the power that the portion should not be raised during the mother's life-time. *Wynter v. Bold*, 1 Sim. & Sta. 507.

*Result of the
whole.*

The result of the numerous class of cases on this subject appears to be, that where an estate is settled to the use of the father for life, with remainder to the mother for life, with remainder to the sons of the marriage, in strict settlement, or otherwise; and in default of issue male, with remainder to trustees to raise portions; and the father or mother die without issue male,

“ no sale or mortgage shall be made for raising portions, until
 “ the estate shall vest in possession.” (N)

and leave issue female, in that case, though during the life-time of the surviving parent, the term is vested in the trustees in remainder only, yet such reversionary term may and ought to be either sold or mortgaged for the purpose of raising the portions in the life-time of the surviving parent:—Except, 1st. Where the contingencies on which the portions are to become vested, have not happened. 2d. Where there are express words of negation, that the term shall not be mortgaged in the life-time of the parents. 2 Atk. 357. 3d. Where it is obviously against the intention of the parties, without eagerly catching at trifling circumstances. 6 Ves. 380. 2 Eden, 26. 4th. Where the portions remain contingent (although the term be vested). Salk. 159. 2 Vern. 640. 3 Ch. Rep. 190. 2 P. Wms. 93. 2 Bro. P. C. 487. 5th. Where the amount of the portions depend on the appointment of the father or mother by deed or will. 6 Ves. 380. 1 Sim. & Stu. 507. 6th. Where the term is to commence after the death of the father and mother; and the portions are not to be raised till after the commencement of the term. 1 P. Wms. 448. 2 Vern. 760. 10 Mod. 433. 1 Eq. Ab. 339. 7th. Where maintenance is not to be raised till after the trustees are in possession. 2 P. Wms. 485. 3 Bro. P. C. 437. 3 Atk. 40, *contra* where the maintenance is a present provision. 2 Atk. 355. 8th. Where the portions are to be raised as soon after eighteen or marriage, as conveniently may be, for it cannot be conveniently raised by mortgaging a reversion which would incommode the family to that degree as to ruin the estate. 2 P. Wms. 94; and, 9th. The court having always expressed a great unwillingness against raising portions out of reversionary terms. 4 Ves. 440, where an intention to raise the portion immediately can be collected by construction or implication only. 3 Atk. 417. 2 P. Wms. 179.

Maintenance also, may, in cases of necessity, be raised by mortgaging the reversionary term, but instances of this description of mortgage are very rare; indeed they have been denied to exist (*ante*, p. 94); this, however, does not appear to be the case; see *Ravenhill v. Dansey*, *Lydon v. Lydon*, *ubi supra*.

And note, that where a term for raising portions by sale or mortgage, is placed after an estate tail, which should have been placed before it, the court will rectify the mistake. *Henage v. Hunloke*, 2 Atk. 456.

And, lastly, note, that on a bill filed for raising portions out of real estate, the infant heir ought to be made a defendant, not a plaintiff. *Plunket v. Joyce*, 2 Sch. & Lef. 159. *Vide etiam* *Ib.* 212.

(N) Per Lord Hardwicke, in the case of *Hall v. Carter*, Atk. 356, and see a modern form of this species of proviso in the Third Volume, *cir.* No. 13.

But notwithstanding the words in the text may be added to the proviso for portioning in the settlement, the portion will be a vested interest in substance immediately on the child's attaining twenty-one or marriage, though in the life-time of the parents, but it will not be raiseable till the death of the surviving parent, supposing that to be the period when the term is to vest in possession. Nor, as it should seem, will interest be payable in the mean time between the vesting of the portion substantially, and the time to which its pay

[101 *]

Portion when vested, and how made contingent.

*Executor may
mortgage terms,
except where.*

An executor or administrator are also now generally considered as invested by the law with the power of selling, or perhaps mortgaging, leases for years and chattel interests belonging to their testator (*f*); for although it appears to have been once decided in the House of Lords otherwise (*g*), namely, that an executor could not make a good title to a term to a mortgagee, and a judgment in favour of the mortgagee upon that ground, was reversed in the House of Lords: yet the case as it stood in the House of Lords has since been considered as a case of fraud, and as such standing upon its own particular circumstances. And, if it were otherwise, no one would venture to deal with an executor or administrator, and it would follow, that an executor or administrator would be under an incapacity, and disabled to sell, though there were ever so much occasion for it for payment of debts. And this seems reasonable; for how can it be expected that a purchaser should take upon him to make out the account as to the quantum of debts and assets, when he is not entitled to have the

(*f*) *Ewer v. Corbett*, 2 P. Wms. 149. *Nugent v. Gifford*, 1 Atk. 463. *Mead v. Lord Orrery*, 3 Atk. 233. et vide 237. *Elliott v. Merryman*, Barnard. Chan. Rep. 78. 2 Atk. 42. *Burting v. Stonard*, 2 P. Wms. 150. (*g*) *Humble v. Bill*, 2 Vern. 444. et vide 616. Bro. Parl. Ca. 71. et vide Gilb. Rep. Eq. 113.

ment is postponed. The reasons for vesting the portion are, that the court considers it a hard thing to impute to a father the intention of reducing the descendants of his child to poverty merely from the circumstance of his own child happening to die in his life-time. Not considering that to be the probable meaning of a parent, the court has thought itself at liberty to manage the construction of the words in favour of the descendants, in such a manner as it would not do in the case of a stranger upon a matter of contract, without any mixture of parental feeling. *Wingrave v. Palgrave*, 1 P. Wms. 401. *Woodcock v. Dorset*, 3 Bro. Ch. Ca. 569. *Hope v. Clifden*, 6 Ves. 507. *Willis v. Willis*, 3 Ves. 51. *Powis v. Burdett*, 9 Ves. 428. *King v. Hake*, 9 Ves. 438. *Schenck v. Leigh*, 9 Ves. 300. *Jefferies v. Reynous*, cited 9 Ves. 311. *Emperor v. Rolf*, 1 Ves. 209. *Bayard v. Smith*, 14 Ves. 470. *Howgrave v. Cartier*, 3 Ves. & Bea. 86, and *Chumley v. Meyrick*, 1 Eden, 77. 465. 2 Ib. 7. The only mode of making a provision for children, which shall depend on the condition of their surviving their parents, appears to be to limit the estate over in the event of there being no child living at the death of the survivor of the parents, or in the event of all the children dying before the fund shall be payable. In either of these cases the gift, it seems, will be contingent. *Schenck v. Leigh*, 9 Ves. 312.

vouchers to make such account? Therefore, if such estate be sold or mortgaged in prejudice of a specific or a residuary (o) legatee, his remedy will be against the executor or administrator; but he cannot follow the property into the hands of a purchaser or mortgagee.

And legatee cannot follow property into hands of mortgagee,

But a voluntary alienation by collusion of an executor, will not be binding upon the parties entitled, but will be set aside in equity, which will follow the property in such cases (h) (p).

Except in case of fraud.

(h) *Nugent v. Gifford*, 1 Atk. 463.—[S. C. 2 Ves. 269.—Ed.] *Crane v. Drake*, 2 Vern. 616.

(O) Residuary or general legatees, and, as it seems, co-executors, *M'Leod v. Drummond*, 14 Ves. 353. and S. C. 17 Ves. 170. 172. are never permitted in any case to question the disposition which the executors have made of the assets; but creditors, specific and pecuniary legatees, may follow either legal or equitable assets into the hands of third persons to whom fraud is imputable. Why a residuary legatee should not in such cases of fraud be allowed to follow the assets is not very obvious.

Residuary legatee cannot question mortgage by executor.

MORTGAGE BY EXECUTORS.

(P) The leading case on this subject since that cited in the text, is the case of *M'Leod v. Drummond*, 14 Ves. 353. and 17 Ves. 154, where all the cases are collected and commented on to a considerable extent by the late Master of the Rolls and the present Lord Chancellor.

Executors are in equity mere trustees for the performance of the will, but in many respects, and for many purposes, third persons are entitled to consider them as complete owners. *Hill v. Simpson*, 7 Ves. 166. and see *Taylor v. Hawkins*, 8 Ves. 209. The absolute power they possess over the property of their testator, whether bequeathed in trust or not, is very great; and it is considered necessary, the better to enable them to execute their trust, and prevent the general inconvenience of entangling third persons in inquiries as to the application the executors propose to make of the money produced by the conversion of the assets. *Peacock v. Monk*, 1 Ves. 131. *Paget v. Hoskins*, Prec. Ch. 431. *Brickley v. Donnington*, 2 Eq. Ca. Abr. 253, pl. 10. *Franklin v. Ferne*, Barn. 52. Executors therefore having an absolute power to sell the personal property of their testators, may raise money on the same by mortgage, if in their discretion they think it advisable; but mortgaging is not the natural way of paying debts, for which purpose only, dispositions by executors can in general be made. If they dispose of the assets as a security for, or in payment or satisfaction of their own debts, the late cases seem to shew (with some little qualification which we shall immediately notice) that such sale or mortgage will be void as against the legatees, and persons beneficially entitled under the testator's will.

Power of executor.

The deed of mortgage need not state that the money is wanted for the purposes of the will, for in order to vitiate the security, it must be shewn that

Purchaser must see his money applied.

And a personal estate (i) may be clothed with such a particular trust, that it is possible the court in some cases might

(i) *Barnard. Chan. Rep. 81.*

MORTGAGE BY EXECUTORS.
P. 102
continued.

the money was not borrowed for the payment of debts. *Bonny v. Ridgord*, 4 Bro. C. C. 138, cited; et vide *Langley v. Oxford*, Amb. 17. But if a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted. If an administrator mortgage a term of the intestate's, and make A. his executor, and dies, the equity of redemption will not go to the administrator *de bonis non* of the intestate, but to A., the executor of the first administrator; because at law the mortgage was an alienation of the whole term, and the administrator was not possessed *en auter droit*, but in his own right. *Butler v. Barnard*, 1 Ch. Ca. 234. S. C. 2 Freem. 139.

Mortgage bad by collusion, gross negligence, or notice.

If a person dealing with an executor is aware that the executor is misapplying the testator's property, a court of equity will (under strong circumstances. *Middleton v. Dodswell*, 13 Ves. 266. *Platt v. Sladden*, 14 Ves. 193) interfere on behalf of the persons beneficially entitled. *Crane v. Drake*, 2 Vern. 616. *Ewer v. Corbett*, 2 P. Wms. 148. *Jacomb v. Harwood*, 2 Ves. 268. *Dickenson v. Lockyer*, 4 Ves. 42, 2. If, for instance, one concert with an executor by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing or securing the private debt of the executor (as in *Scott v. Tyler*, 2 Dick. 725), or in any other manner contrary to the duty of office of executor, such concert will involve the purchaser or mortgagee in the fraudulent transaction, and render him liable for the full value, *M'Leod v. Drummond*, 17 Ves. 167. But a person may advance money to an executor on a bond or other chose in action of the testator, without its being from that circumstance inferred that a fraudulent collusion to misapply the assets exists between him and the executor. 14 Ves. 363. Where, however, a person dealing with an executor neglects all ordinary caution and inquiry, and advances him money on a pledge of part of the testator's assets, he must run the risk of there being further demands on the mortgaged property. Thus, where bankers, confidently relying on the integrity of the executor, took an assignment from him very soon after the testator's death of part of the testator's effects as a security for an antecedent debt due from the executor to the bankers, merely on the representation that the whole was left to him personally, the Master of the Rolls said, if they chose to rely on that representation without looking into the will, they took the assignment at the hazard that there might be unsatisfied demands on the funds. 14 Ves. 361. There were circumstances also which shewed that the bankers knew the property to be part of the effects of the testator, and that they were dealing with the executor as executor, but, relying on his representation, they advanced him money, not as executor, but as army agent, on the security of property of his own connected with property of the testator's; and the Lord Chancellor said, in confirmation of the decree made at the Rolls, that he could not hold it competent to an executor to go to a banker immediately after the testator's death, and pledge the property of the testator in consideration of a loan to be then made, if the circumstances showed

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require the purchaser of the money to see it rightly applied (*k*).

(*k*) *Barnard. Chan. Rep.* 81.

that the banker knew that he was lending money to that person in a manner not to be applied conformably to the duty of executor, but to his own advantage. 17 Ves. 168. The court, however, will not relieve the legatee or person beneficially entitled, against the misapplication of the assets in cases of long acquiescence. *Andrew v. Wrigley*, 4 Bro. Ch. Ca. 125. 3 *Ibid.* 633. *Bonny v. Ridgord*, 1 Cox, 145. *Chalmer v. Bradley*, 1 Jac. & Walk. 51. 63. Hence gross negligence merely in the purchaser or mortgages, without any direct fraud, will, it should seem, be sufficient to induce the court to set aside the mortgage or purchase in favour of the legatee. *Scott v. Tyler*, 2 Dick. 725. S. C. 2 Bro. Ch. Ca. 433. *Hill v. Simpson*, 7 Ves. 152. So if an executor or administrator grant a lease either absolutely or conditionally to a person who has notice that a sale of the premises was required by the parties beneficially interested, it will be set aside. *Droham v. Droham*, 1 Ball & Bea. 185.

MORTGAGE BY
EXECUTORS.

These propositions have been for the most part recognized and confirmed by the present Vice-Chancellor, in the late case of *Kean v. Roberts*, 4 Madd. Rep. 352. The case charged by the bill was, that certain executors, being greatly indebted to their bankers, sold out the whole of the testator's assets, which consisted of money in the funds, and instead of carrying the produce to the executorship account, they, in fact, carried it to the liquidation of their own private debts; and that at the time these transactions took place, the bankers had full notice of the testator's will, and especially knew that the first purpose of his will was to invest a sum of 25,666*l.* in trust in the purchase of parliamentary stock or public funds, or on real or government securities. His Honour the Vice-Chancellor admitted, that if the case so charged by the bill had been established in proof, the claim by the plaintiffs against R. and L. the bankers, would have been irresistible; for they would have been plainly parties to a gross breach of trust by the executors. But his Honour thought there was not any evidence to that effect. Every person, he said, who dealt with an executor, knowing his character of executor, had necessarily implied, if not express, notice of the will; but all dispositions made by a will of personal property were by law subject to a prior charge for the payment of debts; and as a purchaser of real estate devised in aid for the payments of debts was not bound to inquire into the fact whether the sale were made necessary by the existence of debts, because he had no adequate means to prosecute such inquiry, so he who dealt with an executor for personal assets was, for the same reason, absolved from all inquiry with respect to debts; he had a right to assume that the executor sold in the necessary course of his administration, and it was upon this principle, altogether indifferent what disposition may be made in the will with respect to the personal property for which he dealt; for, whether it were specifically given, or constituted a part of the residuary estate, it was equally charged by law with the payment of debts; if it were otherwise, the powers of an executor would be wholly inadequate to the administration of the testator's estate.

Preceding ob-
servations con-
firmed.

With a view to the cause in dispute his Honour further observed, that he

Inrolment of
decree.

Where a mortgage is made under a decree, the due inrol-

MORTGAGE BY
EXECUTORS.

*Mortgage for
money advanced
prima facie
no fraud; con-
tra if to secure
executors pri-
vate debt.*

had carefully examined every authority upon the subject; and he thought the result might be thus stated.—Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving in pledge any part of the personal assets of the testator, whether specifically given by the will or otherwise for money advanced to the executor at the time, because this sale or pledge is held to be *prima facie* consistent with the duty of an executor. On the contrary, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his own private debt due from the executor; because this sale or pledge is *prima facie* inconsistent with the duty of an executor. To these propositions, however, (his Honour continued) there were some exceptions. Thus a sale or pledge for the private debt of the executor has been supported under special circumstances in Lord Hardwicke's two cases of *Nugent v. Gifford*, 1 Atk. 463. S. C. 2 Ves. 269, and *Mead v. Orrery*, 3 Atk. 237. though not entirely to the satisfaction of every succeeding judge; and Lord Eldon seemed to consider the case of *M'Leod v. Drummond*, *ubi supra*, as an exception to the first proposition. It was upon the principles of these propositions that Sir W. Grant proceeded in the case of *M'Leod v. Drummond*; he there supported the pledge of the testator's bonds because they were deposited in respect of advances made at the time. In the same case of *M'Leod v. Drummond*, Lord Eldon, on an appeal, admitted these principles, but he seemed to consider the circumstances of that case as forming an exception to the general rule. The advances, though made at the time, were made to two executors who were partners as army agents, and were made to them in the course of their business of army agents, and necessarily therefore for their private purposes; and he inclined to think that the bankers were for that reason as much parties to the breach of trust as if they had applied the money to pay the private debt of the executors. And, finally, the Vice-Chancellor remarked, that he could not but lean strongly to Lord Eldon's view of the lastly cited case; for if a party dealing with an executor for the personal assets pays his money to the executor, so that it may be applied for the purposes of the will, he is not responsible for the executors' misapplication of it; but if in dealing with the executor he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or the private trade of the executor. But in the case in question the bankers were agents to the executors, and received the monies by their authority, remitting it to them in the course of their duty as agents, and leaving the application of it to the purposes of the will wholly in the power of the executors. There being therefore no ground for imputation on the bankers, the bill was dismissed as against them with costs.

*Mortgage to
co-executor, or
for debt due
from testator.*

It is further observable, that where there are several executors, each has entire control over the testator's personal estate; he may release, mortgage, or transfer the same without the concurrence of his companions; and therefore

ment and entry of the decree should be attended to by the mortgagee.

one executor may mortgage to his co-executor the personal assets of the testator as a security for a private debt due from the former to the latter, if there be no fraud or reasonable ground of suspicion (*Jacomb v. Harwood*, Belt's Supp. to Ves. 338. and 2 Ves. 386); for it is, in cases of fraud, collusion, or great negligence only, that the court will allow the assets to be followed. *Hill v. Simpson*, ubi supra. So also an executor may mortgage assets of his testator for the better security of a debt due from the testator to himself. *Jacomb v. Harwood*, 2 Ves. 265. *Taxer v. Ivie*, Ib. 466.

MORTGAGE BY EXECUTORS.

On a deposit by executors of the testator's property with their own, for their own private debt the latter must be first applied; but if that should be inadequate, the testator's effects cannot be taken in execution for the executor's debt. 17 Ves. 154. and see *Ray v. Ray*, Coop. Rep. 264. *Freeman v. Fairlie*, 3 Meriv. 30.

Equitable lien.

To enable executors to sell or mortgage real estate, they must have a power so to do, either expressly given them by the will, or resulting to them (though not actually named) by necessary implication, from the produce being to pass through their hands in the execution of their office, as in payment of debts and legacies. *Bentham v. Wiltshire*, 4 Madd. Rep. 49. and see *Anon. Dyer*, 371 b. pl. 15. 1 Anders. 145. *Tenant v. Brown*, 1 Ch. Ca. 180. *Blatch v. Wilder*, 1 Atk. 420. *Yates v. Compton*, 2 Pr. Wms. 309. Kell. 45. Co. Litt. 113 a. n. 2. A testator directing or desiring his estate to be sold, without declaring by whom the sale is to be made, the executors may either sell or mortgage the same if the produce is to be applied in purposes connected with their office. *Warneford v. Thompson*, 3 Ves. 513. (*Pitt v. Pelham*, 1 Ch. Ca. 176. 1 Lev. 304, contra.) By this power, or rather authority to sell, the executors can make a good legal title to the estate in fee-simple without the concurrence of the heir at law of the testator, 2 Pres. Abs. 247. 256. The sale or mortgage in this case should be made by bargain and sale; for persons having an authority cannot be said to convey, but merely to appoint. But the purchaser or mortgagee will be liable to see his money applied, unless there be a proviso in the will expressly exonerating him from that burthen. If, however, the trusts are of long duration, it will not, it seems, be incumbent on the purchaser or mortgagee to see to the application of his money, further than that it is invested in the funds in the name of the executor, in trust, for the purposes of the will. Post, 241. Co. Litt. 890 b. n. 1. xiv. 1. See also the note on mortgages by trustees, ante, 60, 1.

Mortgage of realty by executors.

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For the sake of connection, we may here observe what perhaps would be more appropriate to the subject of the next chapter, that executors may lend out on private security money belonging to the testator which remains in their hands unapplied for the immediate purposes of the will. Indeed it will be his duty to do so, or pay interest himself (at 4 per cent. *Rocke v. Hart*, 11 Ves. 58; and in a special case, beyond mere negligence, as if he employed the money in his trade, 5 per cent. Ibid. and see 11 Ves. 581. *Hall v. Hallett*, 1 Cox. 60. 134. *Forbes v. Ross*, 2 Ib. 113); for, supposing him to have a sum which will not be called for till a distant period, it cannot be imagined that it

Executors may be mortgagees,

**MORTGAGE BY
EXECUTORS
AND
TRUSTEES.**

is to lie idle all that time. Previously to the institution of public funds, it must have been lent out in all cases on private security. It seems, therefore, that the executor is allowed to exercise a fair and honest discretion in placing out the money of his testator at interest, and that if he do so he will not be guilty of a *devastavit*. Per Abbott, C. J. in *Webster v. Spencer*, 3 Barn. & Ald. 364.

but cannot lend money on personal security, nor after decree.

But executors or trustees cannot lend out money on personal security, though words which may imply a discretion so to do may have been used by the testator. Thus where the words were, "or on such other good security as they could procure and think safe;" and the executors lent the legacy on bond. Sir W. Grant held clearly, that the defendants, the executors, were not empowered to lay out the money on personal security; for it was like trustees to sell, who could not be justified in selling for any other price than the best price that could be obtained for the property. *Wilkes v. Steward*, Coop. Rep. 6. *Ryder v. Bickerston*, 7 Bac. Abr. 182. cited 1 Eden. Rep. 149. 3 Swanst. 80. (In the latter case it was held that money lent on a promissory note is not put out on a security). *Vigrass v. Binfield*, 3 Madd. 62. *Walker v. Symonds*, 3 Swanst. 63. So in *Adye v. Feuilletau*, it was held, that an executor lending money of his testator upon bond, is personally answerable if the security prove defective, though his testator was in the habit of lending money on such security, and shall not be indemnified from the profits made by other transactions of the same nature. 3 Swanst. 84. And even if an executor or trustee have a power to lend out the trust monies on real or personal security, it will not enable them to accommodate a trader with a loan on bond. *Langston v. Ollicant*, Coop. 33. But if an executor have lent money on such security, and the legatee or person beneficially entitled have long acquiesced in the loan, it will not be considered such gross neglect as to amount to a breach of trust. *Harden v. Parsons*, 1 Eden, 145. Nor can an executor lay out money on mortgage after a decree to account; and therefore where an executor having the personal estate of the testator in trust to place the same out on good and sufficient security, for the benefit of an infant legatee, to be paid on his coming of age, lent part of such personalty out on mortgage after a decree to account, and notice not to do so by the infant's uncle and next friend, he was ordered to pay the same into court. *Widdowson v. Duck*, 2 Meriv. 494. et vide 11 Ves. 581. *Burke Ex parte*, 1 Ball. & Bea. 74.

Benefit accrues to estate, loss to executor.

It is also another principle in equity that if an executor lay out the assets of his testator on private securities, all the benefit made thereby shall accrue to the estate; yet the executor shall answer all the deficiency, and the particular circumstances of good conduct in the executor cannot prevail against the general rule. *Adye v. Feuilletau*, 1 Cox, 24. 3 Swanst. 84. et vide 2 Cox, 1.

See further on the subject of mortgages by executors, *Lowther v. Lowther*, 13 Ves. 95. 402. *Tomlinson v. Smith*, Finch, 378. 457. *Piety v. Stace*, 4 Ves. 620. *Skipbrook v. Hinchinbrook*, 16 Ves. 477. Cases cited by Mr. Eden, 1 Lord North. Rep. 150, n. (a). *Graham v. Keble*, 2 Dow. P. C. 24. 4 Dow. 209. 3 Ves. 101. 565. 5 Ves. 839. 9 Ves. 86. 11 Ves. 226. 333. Amb. 25. Post, 223. 568, 569, 570, and notes there.

Of mortgages and sales by trustees who have power to

The common power usually introduced into marriage settlements, enabling trustees to alter and vary the securities, does not in general authorise more than an investment by way of mortgage, although in event it often happens

that an investment by way of absolute purchase would be more beneficial to the objects of the trust. The words of the power usually are "government or real securities," which clearly do not authorise a purchase. Sir S. Romilly, in one case, contended, that a trust to lay out money on "good security," would not warrant a loan on mortgage; but in this remark Sir Samuel must have been influenced by the argument in his waistcoat pocket, if indeed it were his real opinion. What can afford a better security than an ample freehold estate with a good title? If, however, the trustees take upon themselves to change the nature of the property by selling out of the funds and purchasing land, they should take care to be provided with an indemnity against any losses they may sustain by reason of such conversion. He may take such indemnity either from the tenant for life, or from the other adult *cestuis que trust* requesting the purchase. This indemnity is rendered necessary under the consideration, that the *cestuis que trust*, who, through infancy or other disability, cannot concur in the transaction, may, when of age or capable of acting, elect either to have the money replaced or be paid the produce of it. *Bostock v. Blakeney*, 2 Bro. Ch. Ca. 653. And even if the trust authorise a purchase of lands, it should be observed that this will not warrant a purchase of houses, which are of a wearing and consuming nature. *Pinnel v. Hallet*, 2 Ves. 276. And if the lands to be purchased are directed to be of inheritance, that has been held to mean "*freehold of inheritance*," and not to include copyhold, borough-English, or customary lands of inheritance, to which certain fines, fees, heriots, and other customary outgoings are always incident. *Ib.* Et vide *Lewis v. Hill*, 1 Ves. 275. *Belt's Supp.* 140. 344.

MORTGAGE BY
EXECUTORS
AND
TRUSTEES.

alter and vary
securities.

CHAP. V.

OF THE MORTGAGEE, &c.

Who may be mortgagee.

IN respect of the mortgagee of land, he must be a person capable of possessing real property; for a mortgage being at law a conditional sale, no one who is under a legal impediment to take by a purchase, can have the capacity to take by a mortgage. But any one who is capable of taking an absolute purchase, may, it seems, take by mortgage; consequently, all natural and politic or corporate bodies, that are not disabled by law, may be mortgagees. And it seems that some persons, that cannot be mortgagors, may be mortgagees; for an alien may be a mortgagee; but if a mortgage of land be made to him in fee-simple, or for a term of years, he cannot hold it, but the king will be entitled to have it from him (A).

Aliens.

Alien mortgagee.

(A) The estate will not, however, vest in the king till office found, although he may be entitled to it from the time of the making of the mortgage. In the interim, it will vest in the alien mortgagee. 1 Lev. 47. 4 Lev. 82. 5 Co. 52 b. If the alien die before office found, the law will vest the freehold and inheritance in the king. Co. Lit. 2 b. And if two be mortgagees jointly, one an alien and the other not, if the alien die the entirety will not devolve to the survivor, but the king will have his moiety. 1 Lev. 47. 4 Ib. 82; yet till office found the moiety survives. Ib. 5 Co. 5. When the king takes the mortgaged premises, the condition is discharged, and he holds absolutely; and it should seem that the estate is also freed from the equity of redemption of the mortgagor in the king's hands. But if the lands are reconveyed before office found, the lien of the crown is gone; and where an alien was mortgagee of copyhold lands, although the freehold was in the lord, yet it was contended, in argument, 24 Car. 1. that the king would have it; and see 1 Roll. 194. l. 35. Danv. 381. Al. 15. Hard. 495. This, however, is questionable, since an alien cannot take any interest in land, except for the benefit of the crown; and the king cannot be a copyholder, consequently the alien cannot take that which the king cannot have. Hence, therefore, it should seem, that an alien cannot be a mortgagee of copyhold lands. If he be, it will escheat to the lord of the manor instead of the crown. Dy. 2 b. m. 303, a. per Harrison, Reader, Lin. Inn. If an alien take a mortgage in the name of a trustee, the king will not be entitled to the estate mortgaged by inquisition, for at law it will be in the trustee, and not in the alien. The king, however, may sue in Chancery, to have the

A person attainted of treason or felony, before or after attainder, may be a mortgagee, but he cannot hold the thing mortgaged; so a person outlawed may be a mortgagee of lands; but the king will be entitled in both cases to the property in them, subject to the condition in like manner as the attainted person or outlaw held them. *Attainted persons, outlaws.*

So a *fême covert* may be a mortgagee, but cannot be a mortgagor, unless by construction of equity on an agreement that she shall possess separate property, in which case she may probably be so considered (B). *Fême coverts.*

And an infant may be a mortgagee. *And infants.*

trust executed. *Ib.* and 1 Roll. 194. l. 40. 534. l. 50. Al. 16. Hard. 495. Danv. 521, 2. This subject is further discussed, 1 Watk. Cop. 38, and note, 4th edit.

There is also another incapacity to take as mortgagee, and that is in the case of a papist. By the stat. 11 & 12 Will. 3. c. 4, it is enacted, that every papist, who shall not abjure the errors of his religion, by taking the oaths to the Government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking by descent as well as by purchase, any real estates whatsoever, and his next of kin, being a Protestant, shall hold them to his own use, till such time as he shall comply with the terms imposed by the act. This clause of the statute, it is remarkable, extends only to the case where the papist is under eighteen at the time the lands are conveyed to him; but where the papist is above eighteen when the lands come to him, or in trust for him, such papist is for ever incapable to take, and the estate is void. *Vane v. Fletcher*, 1 P. Wms. 353. 2 Eq. Ab. 231, pl. 9. 477, pl. 1. The case of *Lewther v. Fletcher*, 7 Vin. Abr. 53, pl. 5, was the case of a papist mortgagee. Lord Parker said, though the mortgage is void by the statute of William 3. yet, as the papist had a judgment which was not an interest in land, and the lands were to be sold under a decree for payment of debts, a court of equity ought to assist a fair creditor (though a papist) in obtaining satisfaction of his debt. The rigorous restrictions of this act have been in a great measure alleviated by a subsequent statute (18 Geo. 3. c. 60.), which permits Roman Catholics to take real property, on their taking the oaths of allegiance to his Majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the See of Rome. See also the toleration act of the Roman Catholics, 31 Geo. 3. c. 32. and 2 Sch. & Lef. Rep. Index, *vide* Papist. *Papists.*

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(B) A *fême covert* may make an equitable mortgage of her separate property, without the concurrence of the trustees, unless their consent be required. *Married women.*

dered necessary by the instrument giving her that property. *Essex v. Atkins*, 14 Ves. 542. Ante, p. [59]. And if she have a power of appointment which may be exercised by her, notwithstanding her coverture, she may appoint a conditional estate in exercise of the same. In reference to dispensation with coverture, see Sugd. on Pow. 151. 1 Pres. Abs. 340, and 2 Roper's Bar. & Fem. 99.

As to trustees and executors being mortgagees, see ante, pages 60 and 105.

The mortgagee is to be considered both at law and in equity as the true owner as to all other persons than the mortgagor or persons who can shew a title to compel a redemption. And as to those persons, the mortgagee is to be considered as an indifferent stakeholder, the mortgage not vesting any actual ownership in him, and the estate being in his hands as a mere pledge. 3 Swan, 237.

CHAP. VI.

HOW A MORTGAGE IS CONSIDERED IN EQUITY.

AT common law, while the strict rules of the feudal system were permitted to remain checks upon the free alienation of real property, no idea was entertained of making it subservient to the ordinary exigencies of its owners, by suffering it to become the subject of a pledge. The land-holder, therefore, however pressing his necessities might be, had no means of raising money on his estate, but by a conditional sale; and if, by any unforeseen event, he became incapable of performing the condition strictly, or at least in effect, at the time appointed, his property in the land was gone from him, and absolutely vested in the purchaser, without any possibility, at law, of recovering it. The consequence of which was, that an estate of great value might be forfeited for a trifling consideration (A). But when the stern and rigid severities of that tenure yielded to the importunities of a more refined age, and the benefits of commerce were found to keep pace with the extension of a free alienation, the courts of equity moulded contracts respecting real property into the shape most convenient for the purposes of society. In adjusting the various rules respecting it, many contests arose between the courts of law and equity; the former ever displaying a strong inclination to adhere to the old rigid maxims introduced for the purpose of preserving real property unalienable; whilst the latter were disposed to consider the essential nature of contracts, and to give them operation according to the intention of the parties stipulating. In the end they prevailed, and an equitable jurisdiction was gradually introduced, which, by correcting without enfeebling the severe rules of the common law, laid the founda-

Origin of equitable jurisdiction over mortgages.

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(A) Lord Hale observes, that in 14 Rich. 2, the parliament would not admit of redemption after breach of the condition. See printed Rolls, vol. iii. p. 259. and *Roscarick v. Barton*, 1 Ch. Ca. 219.

tion of a system of jurisprudence, admirably adapted to the free enjoyment of property (B).

Now the creature of equity; and there considered a chattel though in fee (c).

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Debt paid, mortgagee a trustee;

The law respecting mortgages became almost a subject of exclusive jurisdiction in those courts, for although in law the mortgagee (the mortgage being effected by a conditional alienation of the land and an actual livery) was considered as the proprietor, subject to be divested of it only by the strict performance of the condition, yet, in equity (a), the transaction was deemed a mere personal contract for the loan of money, and the land a security for the due performance of that contract, and the mortgagor was looked upon, notwithstanding the solemnities attending the conveyance, as the actual owner of the land. The debt consequently was there esteemed the principal, and the land the incident (d); and whenever the debt

(a) Prec. Chan. 99. Barnard. 93. 1 Ves. 361.

(B) Courts of equity made many scruples about breaking in upon the rules of law, Tr. Eq. lib. iii. s. 1. c. 2, but at length established an incontrovertible right to redeem, though the exact period when that right was first allowed, cannot now be traced with precision.

Mortgagee in fee personal estate.

Mortgage by demise preferred.

(C) No doctrine is now more clearly settled, than that the estate of a mortgagee in fee (not in possession, and equity of redemption not foreclosed or redeemed), in the mortgaged lands, is considered in equity as personal estate. *Fisk v. Fisk*, Pr. Ch. 11. *Audley v. Audley*, 2 Vern. 192. *Howell v. Price*, 1 P. Wms. 295, and Mr. Cox's note. *Sparrow v. Harcastle*, cited in note (E), p. 111, 112, 113, ante, and infra, 338. The mortgagee has indeed the whole legal estate, but the mortgagor is in equity treated as the owner of the entire equitable fee-simple. 12 Ves. 334. 17 Ves. 133. The mortgage then being personal property, observe the advantage of a mortgage, by demise over a mortgage in fee. In the case of a mortgage by demise, the term and the right in equity to receive the mortgage debt, will, on the death of the mortgagee, vest in the same person; whereas, in the case of mortgage in fee, the legal estate, on the death of the mortgagee, will descend to his heir at law or devisee; and the money will be payable to his executor or administrator. This produces a separation of rights, which is often attended with great inconvenience, both to the mortgagor and mortgagee. On the other hand, in the case of a mortgage for years, there is this defect; that if the equity of redemption be foreclosed, the mortgagee will be entitled for his term only. See this subject more fully discussed, ante, page 8, and notes (D) and (E), page 7, and note (I), page 9.

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Mortgages, how considered in law and equity.

(D) A similar rule prevails in the civil law. There the debt intended to be secured is considered the principal, and the securities are considered as adjuncts depending for their existence on the existence of the debt. The

was discharged, the interest of the mortgagee and all derivative and incidental interests dependant thereupon, in the land determined of course, the land being, in equity, bound with the power of redemption in whatever hands it might be, the legal possession became in equity, as to any estate outstanding, a trustee only for the mortgagor (b). But until redemption or satisfaction, the mortgagee's interest was good, in equity (c), to entitle him to receive and enjoy the profits.

From viewing the subject in this light, this conclusion necessarily followed, that a mortgage was not such an alienation of a

Previous disposition of estate affected pro tanto only by mortgage.

(b) 2 Vern. 575.

(c) *Roper v. Rudcliffe*, 9 Mod. 196.

consequence is, that when the debt is discharged, the securities, and all the estates, interests, liens, and charges created by them are extinguished; or, to use the language of the civil law, are confounded, and from that time have no legal existence.—In this light, generally speaking, when the rights of third persons do not interfere, the debt and security are viewed by our courts of equity. But in courts of law, the land alone is looked at; and the mortgagor is treated as a grantor, and the mortgagee as a grantee of an estate on condition. Immediately on the execution of the mortgage, the land vests in the mortgagee, subject to be divested on payment of the mortgage money on a certain day. If the money be then paid, the condition is said to be performed, and the mortgagor, as in any other case where the grantee of lands on condition performs the condition, may enter on the land and hold it as of his former estate. But if the money be not paid at the time appointed for payment, then at law, the land will be discharged of the condition, and it will become absolutely vested in the mortgagee; the mortgagor, however, having a right in equity (called his equity of redemption) at any time after the condition broken, to redeem the estate by paying to the mortgagee his principal, interest, and costs. But at law, the mortgagor will have no right to repossess himself of the estate by payment of the money. It is also worthy of remark, that after the condition broken, the estate will, for all legal purposes, remain in the mortgagee; and can be re-vested in the mortgagor in no other way than by a re-conveyance from the mortgagee, his heir or devisee. In the view, however, of a court of equity, the land, immediately on the payment of the mortgage debt, will become the absolute property of the mortgagor; and a court of equity will decree the mortgagee to re-convey it to him, and account to him for the intermediate profits, for the lands being originally only a security for the money, the payment of the money, either before or after the condition broken, will, in consideration of equity, put the mortgagor in his first estate; and with respect to the surplus of the estate over and above the mortgage money, the mortgagee will at all times be looked upon in equity as a trustee for the mortgagor. See Fitzg. 241. 2 L'ecm. 202. [Et vide infra, pages 251, 2, 3.]

man's real property, as altered any disposition of it previously made; but only inasmuch as it was thereby necessarily affected, *ex. gra.* having been pledged by the owner, it could not be recovered by him or his alienees, but by discharging the demand for which it was a security, that being a lien thereupon.

Mortgage in fee not a total revocation of voluntary settlement.

Therefore where T. seised in fee (*d*), settled his lands by a voluntary conveyance to the use of himself for life, with remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himself in fee, with power of revocation; and seven years after mortgaged those lands in fee to one of the three brothers, that were remaindermen; and the condition of redemption was, that if the mortgagor or his heirs paid the money at the day, he should have the land in his former estate; the mortgage became forfeited and the mortgagee afterwards purchased of his elder brother, who was the heir at law. The third brother then brought his bill for the third part, by virtue of the remainder in tail limited to him and his two brothers; and the question was, whether the mortgage was a total revocation, or only *pro tanto*? and held it was a revocation *pro tanto* only, the mortgagor being to have the lands, on payment, as in his former estate.

Mortgage in fee, total revocation of prior will at law, but in equity pro tanto only.

So where I. S. in 1663, by his will in writing, devised lands to A. in tail male, remainder to the plaintiff in fee, and having afterwards occasion for money, mortgaged those lands in fee, and in 1683 died (*e*): A. being dead without issue, the plaintiff, who had the remainder, brought his bill to be let into the benefit of this devise. It was objected by the counsel for the defendant, who was the heir at law, that this being a mortgage in fee, was an absolute revocation of the devise; although, if it had been but a mortgage for years, then they admitted the reversion would have passed, and that would have carried with it the equity of redemption (*f*), and so the revocation would

(*d*) *Thorne v. Thorne*, 1 Vern. 141. 182. Fitzg. 217.—S. C. Finch, 38.—Ed.]

(*e*) *Hall v. Dunch*, 1 Vern. 329. 342. *Lord Bridgewater v. Duke of Bolton*, 2 Ld. Raym. 968. 2 Will. 649. *Earl*

of Lincoln v. Rolle, Show. Par. Ca. 156. *Montague v. Jefferys*, 1 Roll. Abr. 616, letter u. No. 2. 2 P. Wms. 335.

(*f*) 1 Salk. 158. 1 Vern. 97. 3 Atk. 748.

have been *pro tanto* only. But here being an estate in fee mortgaged, *that* went to the whole, and was a full and absolute revocation in law; and being so in law, there was no reason for equity to aid the plaintiff against the heir at law. But the Master of the Rolls was of opinion, that a mortgage was a revocation *pro tanto* only, which decree was afterwards affirmed upon appeal to the Chancellor, his Lordship declaring (g); that though the mortgage in fee was a revocation at law, yet, in equity, it should not be taken for a total revocation, but the devisee should be admitted to the redemption: for the intent of the mortgagor, in making the mortgage, could be no other than only to serve his special purpose of borrowing money to supply his present occasion (E).

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(g) 1 Vern. 342.

(E) The true ground on which a mortgage in fee is considered in equity as a revocation of a will *pro tanto* only is, not that the conveyance was intended for a particular purpose merely, nor that thereby the intention would be opposed; but that the whole transaction amounts to nothing more than a security for the mortgage money. The late cases on this subject are *Sparrow v. Hardcastle*, cited 7 T. R. 417, in notis. *Harwood v. Oglander*, 6 Ves. 231, affirmed 8 Ves. 106. *Charman v. Charman*, 14 Ves. 580. *Innes v. Jackson*, 16 Ves. 356. 1 Bligh, 101. *Vawser v. Jeffry*, 16 Ves. 519. *Tucker v. Thruston*, 17 Ves. 131. Antecedently to these adjudications, abundance of cases are to be found in the books in which the doctrine of revocation of wills by subsequent conveyances has been extensively, though rather confusedly treated. As a leading case, that of *Lord Lincoln's*, 1 Eq. Ca. Abr. 411. 2 Freem. 202. Fitzg. 241. may be selected, wherein the doctrine of the court, as it is now established, was produced and approved of by the court, and afterwards affirmed in parliament. Show. P. C. 154.

A mortgage in fee has been uniformly allowed to be a revocation of a devise at law, because thereby the testator conveys out of himself the whole legal estate which must of necessity be held to revoke a previous disposition by will of the same estate; for, as Lord Hardwicke observes, in *Sparrow v. Hardcastle*, "the estate being gone by the conveyance, the will has lost the subject of its operation;" and although the testator may receive back the same estate in exactly the same plight and condition, yet, since he will then be seised of it as a newly-acquired purchase *feudum novum ut antiquum*, his prior will cannot consequently have any operation on it, it being then looked upon, as it regards the devise, in the same light as any other after-purchased property. On these principles, therefore, if a tenant in tail, after making his will, suffer a recovery, and declare the uses to himself in fee, with an express declaration, that he means it to operate in corroboration of his will, yet such a limitation of the ultimate use to himself in fee, will operate as a

Estate parted with, but for a moment, and same use taken back, entire revocation of prior will at law.

Mortgage to devisee, total revocation.

But, if the mortgage be made to the devisee, subsequent to the devise, that will be a total revocation, the two interests of

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continued.

revocation, and not as a confirmation of the will. *Dister v. Dister*, 3 Lev. 108. *Marwood v. Turner*, 3 P. Wms. 163. So, if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and dies without making any new testamentary disposition of the estate, the devise made prior to the fine will thereby be revoked; per Lord Hardwicke, in *Sparrow v. Hardcastle*, ubi supra. See other instances of this rule, *Darley v. Darley*, 3 Wils. 6. 1 Roll. Abr. 615. *Bridges v. Chandos*, 2 Ves. 430, and among the modern cases, *Parker v. Brisco*, 3 J. B. Moore, 24. *Doe v. Dilnot*, 2 New Rep. 401. But if a mortgagor devises the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate to a trustee in trust for the mortgagor, such a transfer of the legal estate will not operate as a revocation of the will. *Doe v. Pott*, 2 Doug. 709.

Same in equity,

Thus much for the rule at law. In equity a similar doctrine prevails; for on the maxim *equitas sequitur legem*, and for the sake of keeping a strict uniformity between the rules of law and equity, regarding real property (which it is so important to preserve, *White v. Exer*, 2 Vent. 340), courts of equity are bound to follow, and wherever practicable, to adopt the authorities of the common law courts in decisions of this nature, and therefore as by the rule of law respecting the legal estate, if that interest be parted with but for a moment, although the same use be taken back, yet the prior devise will be revoked; so, in a similar case, as it regards the equitable interest, if the whole beneficial ownership be divested out of the testator but for a single instant, there will be an entire revocation of the devise of the equitable ownership also; for there is not any reason why a court of equity should proceed on a different rule from a court of law, in determining the same case. *Lord Lincoln's case*, ubi supra, is a strong authority to this latter point. In that case, Edward, Earl of Lincoln, mortgaged the manor of S. by a conveyance in fee to one Wynn, whereby the estate was converted into an equitable interest in Lord Lincoln. His Lordship afterwards made his will, and devised his estate, subject to the mortgage, to certain uses, with remainders over. Shortly after this, the Earl took a fancy to one Mrs. Calvert, and, having some notion that he should marry her, proceeded to make a marriage settlement, by conveying the devised premises by lease and release, to certain trustees, to the use of himself and his heirs, till the marriage should take effect, then, as to part, in trust for his intended wife in lieu of dower, &c. with several other limitations and remainders over. The marriage never took effect, and the Earl died soon after the execution of the settlement; when a question was made whether the lease and release of the equitable ownership did not operate to revoke the prior devise of the same interest. Lord Somers, L. K. decided that it did, for that such a lease and release would have been a revocation of a devise of a legal estate, and equitable estates were governed by the same rules as legal estates were, and there was no fraud or circumvention, nor other equitable circumstances to make the court vary from that rule in the present instance. The

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Will was in disinheritance of the heir, who is always favored in all courts; and as to the cases put, where mortgages had been held to be no revocations in equity; the reason of that was, because mortgages were not considered as conveyances of the estate, but only charges upon it. This being the Lord Keeper's opinion, the plaintiff's bill was dismissed, and the co-heirs were decreed to have the redemption of the mortgage.

It being then a rule, that a conveyance in fee, either by lease and release, fine, or recovery, will operate as an entire revocation of a preceding devise, as well in courts of equity as in courts of common law, it next becomes incumbent to inquire how a mortgage in fee, executed by either of those species of assurance, will amount to a revocation in equity *pro tanto* only; when, if the proviso had been omitted, it would have clearly operated as an entire abrogation of the devise? This apparent inconsistency is reconcileable on the consideration that a mortgage in fee, in the view of a court of equity, is looked upon as a chattel interest, descending to the executor, for whom the heir is merely a trustee, supporting no dower, and having no one property of a real estate; the single object of the transaction, in its original construction, being to create a security for money, and that only; for the mortgagor retains the whole equitable fee-simple. *Radcliffe v. Warrington*, 12 Ves. 334. A court of equity, therefore, regards the property as only charged by the mortgage, and in no way passed, modified, altered, or affected; the mortgagee, after foreclosure, acquiring a new estate (see *infra*, 338.)

but case of mortgage, an exception, because a chattel;

Hence it follows, that the equitable estate will remain in the testator unaffected, except to the extent of the incumbrance; and the devise will be unrevoked; for the subject-matter on which it was intended to operate, will not have been, by the mortgage, drawn out of the devisor. If, however, uses, beyond the mere purpose of the mortgage, be declared, the estate must undergo an alteration thereby, and the devise will consequently be repealed. If, therefore, a tenant in tail, in making a mortgage, suffers a recovery; and declares the use in the first place for securing and corroborating the mortgage, and then to other uses, with the ulterior use to himself in fee, the estate will be altered, and the will clearly revoked; for the mode of effecting the intention being by recovery, with double voucher, which in equity as well as at law, proceeds on a previous conveyance of the whole estate from the owner to the tenant to the præcipe, to be recovered out of him by the demandant, or if the whole estate be not conveyed to the tenant to the præcipe, but only an estate of freehold (which will be sufficient to support the recovery), the judgment of the court will vest the whole estate in the demandant, from whom a new estate is taken. This, therefore, will be a revocation; and that, although the recovery be not in fact proceeded in further than the conveyance to the tenant to the præcipe, if that conveyance be of the whole estate. But if no use be declared beyond the purpose of the mortgage (and which it is not necessary to declare, since in equity the estate is considered as not passing out of the mortgagor, 17 Ves. 139), no repeal of the devise will ensue. This observation, however, is not applicable to the case of a tenant in tail, who makes his will, and then mortgages his estate by recovery, because in every such case there will (if the mortgagee has an effectual security) be another object to effect, besides the mere purpose of the mortgage, namely, the docking the

unless uses beyond mortgage be declared, or assurance be by recovery.

a mortgagee and a devisee being inconsistent with each other.

entail, or the barring the remainders, to effectuate which we have seen the whole estate must be divested out of the tenant in tail.

Tenant in tail can never mortgage by recovery without revoking will.

As a corollary, therefore, it may be said, that a mortgage by a tenant in tail will, in all cases, operate as an entire revocation of a previous disposition of the estate by will if the assurance be by recovery. In ordinary cases, if a tenant in fee-simple make his will, and then by a conveyance in fee executes a mortgage, with a proviso to be void on non-payment of the mortgage money, such a transaction will not of itself be a revocation of his will, except to the extent of the charge. And if, in pursuance of a proviso for re-conveyance, on payment of the money, the mortgagee were to re-convey the estate to the mortgagor, after the condition broken, yet it should seem that this would not be any revocation of the devise in equity, but only a re-vestment of the empty legal estate in the mortgagor, who would not thereby acquire any new equitable title. And this supposition is confirmed by the decision in *Harmood v. Oglander*, where it was held that a devise was not revoked in equity by a conveyance in fee for payment of debts (which was a quasi mortgage), though after the debts were paid, the devisor took a re-conveyance to him and his heirs; *et vide* 3 Ves. & B. 385, and *Doe v. Pott*, 2 Doug. 709.

Effect of mortgage by tenant in tail having immediate reversion in fee.

This important distinction, however, must be kept in view where the tenant in tail has the immediate reversion in fee. The operation of a fine is to bar the issue and convert the estate tail into a base fee, which may well enough merge in the reversion in fee in the *quondam* tenant in tail, because such base fee is not protected by the statute *de donis*. If then a tenant in tail, with remainder to himself in fee, makes his will and levies a fine, the effect will be to bar the entail and accelerate the reversion into an estate in possession. The tenant in tail will then be seised of the same reversionary estate at his death as he was at date of his will; the only alteration effected in that estate by the fine being to convert it into an estate in possession. But the operation of a recovery under similar circumstances is obviously different, as the effect of that instrument is to bar the reversion, and enlarge the entail into a newly-acquired fee, which must consequently annul the will. In the one case the old reversion in fee is brought into possession by the fine; in the other, that reversion is barred and destroyed. The party levying a fine merely, has the same estate at his death as he had at the date of his will, the only difference is, that when he made his will, the estate was in reversion—at the time of his death, it is in possession, which alteration does not affect the quality of estate, but only the perception of its attributes. Consequently, the general position that a fine operates in all cases as an absolute revocation (*Vasey v. Jeffery*, 2 Swan. 273), must receive this qualification that it will not so operate when levied by a tenant in tail, but only when levied by a tenant in fee. This distinction is alluded to, though not clearly defined, in *Marwood v. Turner*, 3 P. Wms. 165, and in *Goodtitle v. Otway*, 1 Bos. & Pul. 612. per Eyre, C. J. The application of this doctrine is, that a mortgage and fine by a tenant in tail, with remainder to himself in fee, will not entirely repeal a prior devise, those instruments effecting a revocation *pro tanto* only, on the authority of *Baxter v. Dyer*, 5 Vcs. 659. *Tucker v. Thurston*,

As where one seised in fee of the lands in question (*h*), and

(*h*) *Harkness v. Bayley*, Pre. Cha. 514, et vide *Coke v. Bullock*, Cro. Jac. 49. [8 Vin. Abr. 156.—Ed.]

17 Ib. 134. Et vide Cov. Inc. sec. 3. *Hicks v. Morse*, Amb. 215. *Darby v. Darby*, 1 Dick. 397. 8 Vin. 136. *Cave v. Holford*, 3 Ves. 664. 2 P. Wms. 334. *Parker v. Biscoe*, 8 Taunt. 699.

As to the cases, Lord Hardwicke observed, in *Sparrow v. Hardcastle*, ubi supra:—To effectuate a devise, the general principles are, that at the time of making it, the testator must have a disposing capacity of mind, and an estate in the premises which he takes upon him to dispose of, and that estate must remain in him in the same condition till his death, for any alteration, any new modelling of the estate after the will, will be a revocation of it, unless in certain cases presently noticed. Such are the general principles, and the cases supporting them are strong. If a man makes a will, and after executes a feoffment to his own use, it is a revocation of the will, notwithstanding it is in point of law the old use descendible *ex parte paterna* or *materna*, as before. So where, after making a will, the testator executes any legal conveyance, it is a revocation, *because the estate is gone, and the will has lost the subject of its operation*. Thus far have the cases gone, and the principles established by them have been relied on *here* (that is, in equity), and are universally allowed to be law, without referring to the particular cases, as they stand in the books. The principal ground on which the case in question is put is, that the grant being only intended for a particular purpose, and that purpose being answered, the estate is not altered thereby, but remains as before; and this is compared to a mortgage. A mortgage for years (it is said) is at law only a revocation *pro tanto*, and in equity a mortgage in fee is the same, as being an act intended for a particular purpose, and any other act intended for a particular purpose must (it is contended) be considered in the same light. Mortgages, it is true, have been determined to be only revocations *pro tanto*, and these determinations have been rightly decided; for they are cases of securities for money. The reason why mortgages are taken out of the general rule, is, that they do not depend on the general ground, insisted on at the bar, of being conveyances for particular purposes, but on the foot of being securities only. Whether the mortgage be for years, or in fee, is all one in equity, they are alike considered as chattel interests. A mortgage in fee goes to the executors (for whom the heir is only a trustee), supports no dower, and has no one property of a real estate. That being so, it is not at all inconsistent to say, that such an instrument is no revocation; for the case there is no more than this, the testator, seised of a real estate, devises that real estate, and afterwards parts with nothing but what is personal.

The case of *Harmood v. Oglander*, et. ubi supra, turned on a conveyance for payment of debts, and a recovery was suffered or intended to have been suffered, although it appears under a mistake. Lord Eldon remarked, that the principles deducible from a series of determinations were, first, that equity will never controul the law, except where the testator has, at the date of the will, a different interest in equity from that which he has at law, and devises that beneficial interest, and then only takes the legal estate without any new

Foregoing principles confirmed.

Lord Eldon's two rules.

having one son and one daughter, made her will, and thereby devised them to her daughter and her heirs, and afterwards,

Conveyance for payment of debts, like mortgage, revocation pro tanto only.

Rule disapproved. Bankruptcy revocation pro tanto only.

Use beyond mortgage annulled if contrary to apparent intention.

Rule no longer open to controversy.

modification or alteration. Secondly, Where he has the complete legal and beneficial estate at the date of the will, and afterwards divests himself of the legal estate, but still remains owner of the equitable interest, as in case of a mortgage, or a conveyance for payment of debts, if he dies without taking a conveyance of the legal estate, his equitable interest still continues; and if he has taken back the legal estate, that alone will not revoke the devise of the equitable interest. "To apply these principles (his Lordship continued) to the case before the court, it has been contended, that this deed was for a partial purpose, and no revocation; but I am of opinion the mode taken to effectuate the intention was clearly a revocation at law, provided any estate passed, and there was no republication. If the deviser conveys for the purpose of suffering a recovery, and thereby taking back to himself a new estate, it is clearly a revocation at law as well as in equity. It is said, and I think it probable, that the only object of the intended recovery was to give effect to the mortgage. That circumstance alone will not do, if he does it by way of recovery, and taking back a new estate. The consequence is, unless there was a republication, the will is revoked." And such was the determination of the court, which was afterwards affirmed in parliament, as before noticed.

In *Charman v. Charman*, 14 Ves. 580, it was held, that a devise of real estate would not be revoked by the bankruptcy of the deviser, that is, for so much of the real estate as remains unappropriated to the purposes of the bankruptcy. The Master of the Rolls said, he should be very unwilling to hold any act to be a revocation that was not done for the purpose of revoking the will. In certain cases, however, the court was obliged by authority to consider an act to be a revocation, not only without an intention to revoke, but even against an express purpose to confirm the will; but in the absence of authority, he should very reluctantly consider the bankruptcy as having an operation beyond the purpose intended by it.

The case of *Innes v. Jackson*, 16 Ves. 356, which we shall have occasion to consider more at large in a subsequent note, (circiter, 765, 6,) is a strong case, and shews that the operation of a fine or recovery levied or suffered for the security of a mortgagee would be confined to the confirmation of the mortgage only, in the absence of an express or implied intention to carry it further; and although the uses after the mortgage may be limited differently from what they originally stood, yet the court will take the intention of the instrument for its only guide, and annul all that appears not to have been contemplated or intended by the parties. Hence, therefore, the general principle is, that the devise shall not be revoked without a recital, or some other declaration of an intention to vary the use or ownership of the equity of redemption. This doctrine was not impeached in the Lords, where the case was carried, though under a misapprehension of the circumstances in the court below the adjudication there was reversed. 1 Bligh, 104. *Infra*, 707. 765, 6.

As to *Vauser v. Jeffry*, 16 Ves. 519, that was the case of a jointure secured by a term created after the devise, but the use beyond the term was limited

for securing 4000*l.* which she was indebted to her daughter, she and her son joined in a mortgage of them to her for 500

to the testator in fee. The Master of the Rolls said, he was at a loss to find a distinction between this case and that of *Cave v. Holford*, (3 Ves. 654) except in circumstances unfavorable to the devisees. In that case Lord Chief Justice Eyre's argument was very able and ingenious, upon the ground that there was only a particular and partial purpose, and the conveyance was to operate only *pro tanto* to the extent of the limited purpose; but the opinion of the court of Common Pleas was for a revocation of the will, and the court of King's Bench was unanimous in affirming that judgment. Afterwards the cause coming on for further directions, it was contended, that though not at law, in equity at least, there was not any revocation, yet it was held, as much a revocation in equity as at law, and that decree was affirmed on appeal (4 Ves. 850). Hence, therefore, (said his Honour) the question is no longer open to controversy. The case of *Vawser v. Jeffry* has since been reversed, and the surrender to the uses of the marriage settlement declared not to revoke the Surrender to Will and the Will, the only object of the settlement being to create a jointure merely. 3 Barn. & Ald. 469, 3 Swan, 275. 1 Watk. Cop. 167, 4th edition.

In *Tucker v. Thurston*, 17 Ves. 133, the doctrine under consideration was again alluded to. The Chancellor, in observing that when courts of law take notice of equitable interests, the equitable interests ought to be such as a court of equity regards as substantially equal to the ownership in fee or in tail, remarked, that in the case of a mortgage in fee, after a devise, the deviser still continued the equitable owner, and the devise was revoked *pro tanto* only. Et vide *Doe v. Pott*, 2 Dong. 710.

Testator equitable owner after mortgage.

These are the whole of the modern cases on this subject. It may, however, be proper in the conclusion of this note to advert to the earlier decisions, in order to bring all the authorities on the point in discussion under the eye of the learned reader at one view. The most conspicuous, besides those already noticed, are *Rider v. Wager*, 3 P. Wms. 334. *Parsons v. Freeman*, Amb. 116. S. C. 1 Wils. 308. S. C. 3 Atk. 741, citing 1 Roll's Abr. 616. (though no point of revocation appears there.) *Lamb v. Parker*, 2 Vern. 495. *Villers v. Villers*, 2 Atk. 72. *Stone v. Evans*, Ib. 87. *York v. Stone*, 1 Salk. 158. *Perkins v. Walker*, 1 Vern. 97. *Hall v. Dunch*, Ib. 329. 542. *Casbourne v. Scarfe*, 1 Atk. 606. *Carte v. Carte*, 3 Ib. 179. *Jackson v. Parker*, Amb. 687. contra. *Thomas v. North*, 1 Ch. Rep. 153. *Vernon v. Jones*, 2 Vern. 241. S. C. Pr. Ch. 32. S. C. 2 Freem. 17. *Hicks v. Morse*, Amb. 215. *Hartop v. Whitmore*, 1 P. Wms. 681. *Barnardiston v. Carter*, 8 Vin. Abr. 147 (B). pl. 25. *Saunders v. Hawkins*, Ib. 156, pl. 3. *Williams v. Owen*, 3 Ves. jun. 595. *Cave v. Holford*, 3 Ib. 654. 4 Ib. 850. *Goodtitle v. Otway*, 1 Bos. & Pul. 576. *Baxter v. Dyer*, 5 Ves. 656. *Carrington v. Pyne*, 5 Ves. 404. *Thurstont v. Cunningham*, 2 W. Black. 1046. *Colter v. Loyer*, 2 P. Wms. 622. *Knollys v. Alcock*, 5 Ves. 648. *Tanner v. Venables*, 2 Bing. 136. *Infra*, [187] for a strong case on this subject. *Thynne v. Stanhope*, 1 Addams Ecc. Rep. 52. *Smith v. Cunningham*, Ib. 448. *Medlycott v. Ashton*, Ib. 229. *Cranford v. Coutts*, 2 Bligh. 684. *Anon.* 6 Ann. 8 Vin. Abr. tit. Devise (P), pl. 10, p. 136, where it was held, by Lord

Old and other cases referred to,

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years, to be void on payment of 100*l.* *per annum* to the daughter during her mother's life, and the 4000*l.* with interest, within three months after her mother's death. The question was, whether this mortgage to the daughter, being made subsequent to the devise, were a revocation of the devise in fee to her by the mother's will, or only *pro tanto*? And it was urged, that the mother's intention, in making this mortgage, was only with a design to secure the 4000*l.* she stood indebted to her, not to revoke the devise in fee: but it was decreed to be a revocation *in toto*; for it was made to the same person as was devisee, and therefore inconsistent with the devise (G).

Mortgage by fine come ceo and sur concessit distinguished.

Chancellor Cowper, that if a man devise lands, and afterwards mortgage the same for years, and then levy a fine *sur concessit de droit come ceo*, and not a fine *sur concessit*, this will operate as a total revocation, but that if a fine *sur concessit* had been levied, it would have been a revocation *pro tanto* only. On this, it is observable, that the principles alluded to in the preceding part of this note, as the present received doctrine of the court, seem to reject such a distinction.

Conjoint wills, as "we A. and B. devise, &c." are unrecognized in this country. Consequently, a subsequent separate will, will prevail. *Hobson v. Blackburn*, 1 Addams, 274.

Copyholds.

Lastly, it is merely necessary to notice, that a conditional surrender of copyholds for the purpose of securing the repayment of money to a mortgagee, will not, as it should seem, operate as a revocation of a previous will, provided there be no admittance, and even then it is presumed not in equity, unless there be some object intended beyond the mortgage; but if there be such ulterior purpose, a mere covenant to surrender the copyholds to the intended uses will in equity amount to a revocation; for the court would direct a specific performance of the covenant, *viz.* a surrender to the use of the mortgagee, and then to the uses of the settlement, which would effectually revoke the devise; consequently, a will may be revoked by a covenant to surrender, as well as by an actual surrender made. Per Master of the Rolls, in *Vausey v. Jeffry*, *ubi supra*. Et vide 1 Watk. Cop. 121. 166. 4th ed. 7 T. R. 103.

Disseisin.

Whether a disseisin would be a revocation, see *Charmen v. Charmen*, 14 Ves. 520. Also of an exchange, *Attorney-General v. Vigor*, 8 Ves. 282. Cov. Inc. sec. 3.

Harkness v. Bayley over-ruled.

(G) This case is entirely mis-reported, and every principle is against it. It appears by the decree, that after the date of the will the mother and son conveyed the estate for a term of five hundred years to the daughter, with a proviso, that if the mother or son should pay during the life of the mother 100*l.* a year to the daughter, and the son, after the mother's death, should pay to his sister 4000*l.* then the term should cease; and the decree further stated, that this conveyance was clearly inconsistent with the devise, and that the mother intended the estate to descend to the son, and the will to be re-

Every contract for the securing of money, by the conveyance of a real estate to the lender, not made in contemplation of an eventual arrangement of property, is, in equity, deemed a mortgage (i); and all provisos and stipulations between the

What species of contract is considered a mortgage (ii).

(i) *Mellor v. Lees*, 2 Atk. 495, infra, §26. In order to constitute a loan it is requisite the money be secured in [162. 169.]

(ii) [Lease from debtor to creditor, all events. *Lakey v. O'Donnell*, 1 Sch. 1-Ball & B. 109, infra, [410]. Finch, & Lef. 470.—Ed.]

voked. It is also more than probable from the answers of three of the defendants, that the estate was really the estate of the son, and not the estate of the mother; for the mother appears to have purchased the estate and to have taken the conveyance in the name of her son. The fee being then in the son, they joined as owners of the estate in making the security to the daughter. But, however this might have been, the principle deduced from it by the learned author has been expressly over-ruled by the present Lord Chancellor, in the case of *Barter v. Dyer*, 5 Ves. 661, where it was held, that a devise will not be revoked by a mortgage in fee to the devisee. His Lordship referred to a case of *Peach v. Phillips*, 13th Dec. 1777, of which he said he could find no trace, nor any printed report; but he took it for granted that it was a case before Lord Bathurst, in which *Harkness v. Bayley* was cited.

Since Lord Eldon's decision in 5 Ves. 661, the reports of Mr. Dickens have been published, and the above mentioned case of *Peach v. Phillips* is there noticed. 2 Dick. 538. It fully supports the decision of his Lordship. It was to the following effect:—R. C. made his will, and after ordering his debts to be paid by his executor, devised all his houses, messuages, lands, tenements, and hereditaments to one Phillips (the defendant), and appointed him executor. After the will the testator mortgaged his real estate to the said Phillips, to secure the repayment of a sum of 1500*l.* and died. Two questions arose, first, whether Phillips took an estate in fee or for life under the will; and, second, whether the mortgage after the will was not a revocation of the devise in toto. The cases *Cook v. Bullock*, Gro. Jac. 49. *Perkins v. Walker*, 1 Vern. 97; and *Harkness v. Bayley*, ubi supra, were cited; and the Lord Chancellor (Bathurst), in delivering his judgment, remarked,—The intention of the testator is evident to have his debts paid by his executor. To pay them he must be furnished with the means; he gives him all his estates, and after payment makes him the residuary devisee and legatee. After making this will he mortgages part of the estate. To whom? To the defendant, the executor, by whom he had directed his debts to be paid; but this mortgage is said to be a revocation of the will. It may be quoad the mortgage. But in whom is the estate? The legal estate is in the defendant, the mortgagee, under his mortgage—the equity of redemption is in him by the will. It cannot be said the equity of redemption did not pass by the will—the will has not been disputed—the equity of redemption did not pass to the heir—therefore dismiss the bill; which was brought by the heir to have the mortgage discharged out of the personal estate of the testator.

Mortgage to devisee no revocation.

To every mortgage is inseparably incident an equity of redemption.

parties, tending to alter, in any subsequent event, the *original* nature of the *mortgaged interest*, or prevent the redemption of the estate pledged upon payment of the money borrowed, with interest, are void. For were any such agreements suffered to prevail, they would put it in the power of every mortgagee to take advantage of the necessities of the mortgagor, by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity, therefore, the right of redemption is considered as inseparably incident to every contract founded on a mortgage, and can no more be restrained, than the power of tenant in fee-simple, to alien generally, or of tenant in tail to suffer a recovery; it being a maxim in equity, that the *same* estate or interest cannot be a mortgage at one time, and at another time cease to be so (H).

Once a mortgage and always a mortgage.

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Reasons for this axiom.

(H) Post, [162]. The maxim is, *once a mortgage and always a mortgage*. *Newcomb v. Bonham*, 1 Vern. 8. In that case the mortgage was made redeemable during the life of the mortgagor only, but in regard that the estate was expressly redeemable in the mortgagor's life-time, it was held, that it must continue so afterwards, and per Lord Chancellor, the deeds of lease and release being but a security, the same cannot be extinguished by any covenant or agreement at the time of making the mortgage. Reg. Lib. 1680. B. 538.

The consideration which induced courts of equity to adopt this maxim and to reject provisos and agreements, converting that into a sale which was originally a mortgage on a given event, or on payment of a further sum was, that if such provisos and agreements were allowed, there would have been a door open for the imposition of every kind of restraint on the equity of redemption, and thereby the borrower, through necessity, would have been driven to embrace any terms however unequal or cruel, which would have tended greatly to the furtherance of usury, and the conversion of the equitable jurisdiction of the court into an engine of fraud and oppression. See *Jennings v. Ward*, Vern. 520. So, in *Spurgeon v. Collier*, 1 Eden Rep. 59, Lord Chancellor Northington remarks—The policy of this court is not more complete in any part of it than in its protection of mortgages, and as a general rule for that purpose, a mortgage once redeemable continues so till some act is done afresh by the mortgagor to extinguish the redemption, and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to greedy and designing persons; and, again in *Vernon v. Bethell*, 2 Eden, 113, his Lordship observes, this court, as a court of conscience, is very jealous of taking securities for a loan, and converting such securities into purchases; and therefore it is an established rule that a mortgagee can never provide, at the time of making the loan, for any event or condition on which the equity of redemption shall be discharged and the

Thus, where Sir Robert Jason, father of the defendant, being seised of an estate chargeable with a mortgage for 4500*l.* and interest, to one Fisher, entered into a treaty of marriage with the plaintiff, and, by articles, it was agreed, that 2100*l.* should be paid towards that debt, with 1500*l.* the portion of the plaintiff, and 600*l.* advanced by Sir Robert, which reduced it to 1900*l.* for securing payment whereof, by instalments at certain times, a lease of the premises for five hundred years was made to Travers and Finch (*k*), defendants, with a proviso, that afterwards they should join with Sir Robert to convey the premises to trustees and their heirs, to the use of Sir Robert for life, remainder to the plaintiff for her jointure and in full of dower, remainder to the trustees and their heirs in trust, that if Sir Robert should pay the 1900*l.* with interest, amounting to 2700*l.* within the said time, if he should so long live, or otherwise *within three years* after the date of the last-mentioned conveyance, and procure the lease to be surrendered, to the intent that if the defendant, Dame Anne, survived him, she, so long as she lived, might hold the premises discharged

*Proviso to redeem during life of mortgagor only, void, and his heir permitted to redeem. Et vide 119*a*, post.*

[118]
Restraint on redemption void.

(*k*) *Jason v. Eyres*, 2 Ch. Ca. 33. Trin. 32 Car. 2.

conveyance become absolute. And there is great reason and justice in this rule ; for necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them ; et vide *Howard v. Harris*, 1 Vern. 190. 2 Ch. Ca. 147. *James v. Oades*, 2 Vern. 402. *Seton v. Slade*, 7 Ves. 273.

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continued.

At law the axiom once a mortgage and always a mortgage is not received. But in equity it stands on high ground ; for if the transaction, in its spirit and meaning, can be proved to have been originally intended as a mere loan for money secured by a pledge of the estate (to demonstrate which the court, as we shall hereafter see, will give every facility, post, 125, *in notis*), equity will rightly consider it a mortgage, and decree a redemption in the face of an express agreement of the parties, that the estate shall not be redeemable. *Gregon v. Riddell*, 12th June, 1784, MS. cited 7 Ves. 273. 4 Ves. 350. Sug. V. & P. 344. 5th edit. *Seton v. Slade*, 7 Ves. 273. Butl. Co. Litt. 205 a. n. 1. s. 2. This principle of the court is admirably well stated by the learned author of the "Treatise of Equity," lib. iii. c. 1. s. 4. Equity, he observes, is part of the law of England, and therefore it cannot in any manner of way be provided by agreement, in case of a mortgage, that the Court of Chancery should not give relief. For such an agreement would be contrary to natural justice in the creation of it, and prove a general mischief, because every lender would by this method make himself chancellor in his own case, and prevent the judgment of the court. Et vide 1 Ch. Ca. 141. 2 Ves. jun. 129.

Redemption cannot be prevented by special agreement.

of the same, then the said trustees should be seised of the premises to the use of Sir Robert and his heirs ; but in case either of failure of payment, or Sir Robert's death before payment and surrender of the lease, then that the trustees, and the heirs of the survivor of them, should stand seised of the reversion, to them limited, in trust for the plaintiff and her heirs, *not only to enable her to pay the debt, and free her jointure thereof, but to the end she might enjoy the inheritance for increase of her fortune*, according to an agreement between her and Sir Robert; and should convey the same as she, during coverture, or so'e, or her heirs, should direct. Sir Robert Jason died, leaving the defendant his heir. Dame Anne married Eyres, one of the plaintiffs, who, there being a former incumbrance not taken notice of, paid it with damages.

On this case, cross bills were filed by Eyres and his wife to have the inheritance, and by the heir of Sir Robert to have the inheritance on paying the debt.

On the hearing it was argued for Eyres, that it was an express agreement that the wife should have the inheritance, if the debt were not paid, or the lease surrendered ; that it could not be a mortgage as to the wife, though the lease was a mortgage to Fisher ; that if it had been meant to have been a mortgage, the power of redemption would not have been limited to the heir as well as to Sir Robert ; *but it was only limited to him, and not to his heir* ; that there was reason for so doing, because her whole portion had been expended in reducing the debt, and so, until payment thereof, she would otherwise have been without any profits of her jointure ; that in contemplation of this, it was expressly agreed, the reversion settled in the trustees should go to the complainant and her heirs, not only to enable her to pay the debt, and free her jointure, but to the end that she might enjoy the inheritance for the increase thereof. But the court decreed it a mortgage, saying, that if the father, Sir Robert, had lived after three years, it could not have been denied but he might have redeemed it ; and that no mortgage could be altered by any artificial words, unless by subsequent agreements.

So where A. having settled a jointure on the plaintiff before marriage, which proved defective, and not of value according to the marriage agreement, afterwards made her an additional jointure of other lands, and then, in 1673, made a mortgage, to the defendant B. for securing 1000*l.* with interest, in which, among others, part of the jointured lands were comprised (I); in the mortgage-deed there was a special clause of redemption, that if A. or the heirs male of his body, should, in June 1686, pay the principal sum and interest in the mean time, then he, or the heirs male of his body, should be admitted to redeem; and there was likewise a covenant to pay the 1000*l.* on the — day of —, 1686, and interest in the mean time, by half-yearly payments. A. died without issue, and his wife being a jointress of part of the mortgaged premises, and so entitled to redeem the whole, exhibited her bill in 1677 for that purpose. The cause was heard before Lord Chancellor Nottingham, and afterwards re-heard before Lord Keeper North; and both decreed, that the mortgage should be redeemed notwithstanding the mortgagor's death without issue; the rather, because the defendant had a covenant for re-payment of his mortgage money (K).

Covenant to restrain redemption to mortgagor, and heirs of his body, void, he dying sine parole, jointress of part allowed to redeem whole (I).

(I) *Howard v. Harris*, 1 Vern. 33. 190. S. C. 2 Ca. Ch. 147. S. C. 2 Vent. 364.

(I) That is, although the proviso be as in the text, that the mortgagor and the heirs of his body only shall redeem, yet so much is redemption favored in equity, that an assignee will in such a case be permitted to redeem.

(K) But the absence of a covenant to pay the money will not make it less a mortgage; for the Welch and most copyhold mortgages have not this covenant. *Lawley v. Hooper*, 3 Atk. 280. Et vide *Howell v. Price*, Pr. Ch. 424. *Ecklin v. Tasburgh*, post, 133 a. So; in *Mellor v. Lees*, 2 Atk. 495, it was said, that in common mortgages the want of a covenant for repayment of the mortgage money would be no bar to redemption; and Mr. Sanders cites *King v. King*, 3 P. Wms. 360. The covenant inserted in modern mortgages to repay the money borrowed with interest is introduced merely for the purpose of creating a personal contract between the mortgagor and mortgagee for the payment of the money. See ante, pages 16 and 61. The absence of the covenant, however, is sometimes material to explain the nature of the transaction, as in the cases cited, post, 132 and 138 a; and if the covenant for redemption be omitted, the mortgagor will be permitted to read evidence to shew the reason of the omission. *Joyne v. Statham*, 3 Atk. 388. Post etiam, 151. *Walker v. Walker*, 2 Atk. 99.

Covenant for payment of money.

Redemption cannot be restricted.

So, where the condition of a mortgage was to redeem *during the life of the mortgagor*, it was decreed, that the heir might redeem notwithstanding (m).

[120]
Same law where proviso is in deed of defeasance (L).

It make no difference whether the proviso for redemption be in the same deed, or the conveyance be absolute, and the power of redemption given by a distinct instrument. Thus, where A., having a church lease for three lives, conveyed and assigned it to the defendant, B.'s father, in consideration of 550*l.*, and the conveyance was absolute (n); yet B. the purchaser, by deed under his hand and seal, agreed *that if A., at the end of one year, then next ensuing, paid him 600*l.*, he would reconvey.* The 600*l.* was not paid, two of the lives died, the lease was twice renewed by the defendant and his father, and twenty years had passed since the first conveyance, when A. being a prisoner in the Fleet, and indebted to the warden for chamber-rent, assigned to him all his right, title, interest, equity, and power of redemption in the lease; whereupon he brought his bill to redeem, and it was so decreed on payment of the principal, and also the fines paid upon the renewal of the leases with interest (m).

(m) *Kilrington v. Gardiner*, 1 Vern. 2 Vern. 84. Et vide *Croft v. Powell*, 193, cited in the last case. Com. 603.—[Ante, 81. Et vide ante,

(n) *Manlove v. Ball et Bruton*, 12, 13, n.(K).—Ed.]

Defeasances supplied on parol evidence.

(L) And if, after the mortgagor has executed an absolute conveyance, the mortgagee refuses to execute the deed of defeasance, the court will interfere and relieve the mortgagor against the fraud. *Maxwell v. Montacute*, Pr. Ch. 326. *Young v. Peachy*, 2 Atk. 258. *Walker v. Walker*, 2 Atk. 99. And parol evidence will be admitted to prove that an absolute conveyance was made with a condition of defeasance, post, 145. 151; and for further on defeasance, vol. iii. tit. Warrant of Attorney.

Absolute surrender of copyholds, with judgment and note of defeasance.

(M) So, where there was a surrender of a copyhold estate to the use of A. B. without any condition expressed therein, but a judgment was given at the same time, as a further security, with a note in writing under the hands of the mortgagor and A. B. whereby it was agreed, that if the mortgagor should, within a twelvemonth, pay unto the said A. B. the consideration money of the surrender, and all such money as he should disburse in fines for admittance or otherwise, then the said A. B. should surrender back the said copyhold premises to the mortgagor and his heirs, and then also acknowledge satisfaction on the said judgment. The court considered the surrender and judgment as securities only for the repayment of the money, and decreed a redemption sixteen years after the twelve months had expired. *Clack v. Witherly*, Ca. Temp. Finch, 376.

Nor will an agreement to make the conveyance absolute upon payment of a farther sum, if the money lent be not paid

Agreement to make mortgage absolute on pay-

If the condition for redemption in the deed of defeasance be limited to a definite time, as to be exercised during the joint lives of the mortgagor and mortgagee, it will be set aside in the same manner as if it had been contained in the principal deed. Thus, where A. being seised of an estate in the county of Norfolk, which he had mortgaged for 1000*l.* and which mortgage the defendant C. had offered to pay off, as also to advance 200*l.* more, conveyed the said estate to C. and his heirs, absolutely, with the usual covenants for the title, including a covenant for further assurance, and C. entered into a covenant, in a separate deed, to re-convey the premises to A. on payment of the said two sums of 1000*l.* and 200*l.* in their joint lives; and it was agreed that A. should be tenant of the premises, at the rent of 70*l.* per annum. A. was afterwards arrested, at the suit of C. for arrears of rent, and carried to prison, and thence removed by the means of C. to the house of one Carr, where C. endeavoured to prevail on him to deliver up the deed of defeasance. He, however, refused, and made out a bill of sale of all his estates and effects to his son, and soon afterwards died. The son was soon prevailed on to deliver up the deed of defeasance, and then C. set up a title to the absolute ownership of the estate. But Lord Northington, C. decreed a redemption, observing, that if in any case the redemption could have been confined to a period, the conduct of the defendant would, in a court of Equity, have rendered the right of redemption absolute. He had prevented his exercising the limited right stipulated for, by fraud, oppression, and imposition, corrupting the son to rob the father of the deed of defeasance, having first imprisoned the father in a gaol, and next, illegally, in Carr's house, to prevent his looking into his affairs. *Spurgeon v. Collier*, 1 Eden Rep. 55.

Absolute conveyance defeasanced on payment of money during joint lives of mortgagee and mortgagor, bad.

[121 *]

In *England v. Codrington*, 1*b.* 169, the conveyances were held, upon the circumstances and answer of the defendant, to be mortgages, and not absolute conveyances, and the defendant having insisted on the same as absolute conveyances, contrary to the real truth of the transaction, and thereby occasioned the suit, he was decreed to pay the plaintiffs their costs.

Conveyance not decreed absolute, defendant must pay costs.

The case of *Vernon v. Bethell*, 2 Eden, 110, is also in point. In that case, A. having granted a mortgage of anticipation to B. of a West India estate, and being found, upon account taken, to be greatly indebted to him, released the equity of redemption to B. and his heirs. It not appearing, however, at the time, to have been intended as an absolute sale, and B. having, both by letter and in conversation, stated himself as being only mortgagee in possession, a redemption was decreed thirty-three years after the assignment of the equity of redemption, the right to redeem having been acknowledged within the last twenty years. In this case, there were three other circumstances which alone would have been sufficient to have entitled the plaintiff to a decree. 1*st.* The consideration of the conveyance was only five guineas; 2*d.* At the time of the grant of the equity of redemption, there was not any release of the covenant for payment of the money; and 3*dly*, An account had been kept by B. as mortgagee in possession. And see post, page 125 *a*, note. 19 Ves. 411.

What circumstances make absolute conveyance of equity of redemption conditional.

ment of further
sum, if debt
not paid at the
day, void;

at the day appointed, alter the case; such stipulations being deemed unconscionable, because a man ought not to have interest for his money and a collateral advantage besides; nor may he clog the redemption by any bye agreement (o). Therefore, where the plaintiff was the youngest son of his father, and the father being seised, according to the custom of the manor of W., of a copyhold tenement of the nature of *Borough English*, of the value of 15*l. per annum*, borrowed 200*l.* of the defendant's father in April, 1671, and, for securing the same, made a conditional surrender into the hands of two customary tenants of the manor, to be void on payment of the 200*l.* with interest in April, 1672; and at the same time the plaintiff's father entered into a bond, conditioned that if the 200*l.* and interest should not be paid at the day, then, if the defendant's father should, within ten days afterwards, pay him, his executors, administrators, or assigns, the farther sum of 78*l.* in full for the purchase of the premises, the bond should be void, or otherwise should stand in full force. The plaintiff's father died in 1671, before the mortgage was forfeited, leaving the plaintiff an infant of two years old. The 200*l.* with interest, not being paid at the day, the defendant paid the 78*l.* the next day, when, according to the condition of the bond, the mortgage was forfeited to the administrator of the plaintiff's father. The plaintiff's bill was to redeem on re-payment of the 200*l.* with interest, discounting the profits. The defendant, by his answer, insisted it was an absolute purchase, but the court decreed a redemption, not doubting but it continued a mortgage; and as to the 78*l.* declared *that* to be well paid to the administrator, and ordered the whole to be repaid with costs, discounting the mesne profits.

[122]

although agree-
ment be in se-
parate deed, if
made at same
time.

So where A. the defendant, lent money to B. to carry on buildings, taking a mortgage from him to secure 16,000*l.* with legal interest (p); and, in another deed, executed at the same time, took a covenant from B. that he should convey to the defendant, if he thought fit, ground rents, to the value of

(o) *Willett v. Winnell*, 1 Vern. 488. [S. C. Eq. Ca. Abr. 316, pl. 14. Et vide ante, 9, n. (I).—Ed.]

(p) *Jennings v. Ward*, 2 Vern. 520.

16,000*l.*, at the rate of twenty years purchase; on a bill to redeem, the defendant insisted upon the agreement, but a redemption was decreed on payment of interest, principal, and costs, without regard thereto.

Again, where the plaintiff being seised in fee of the lands in question worth 200*l. per annum*, mortgaged the same in 1637 to the defendant's father for 250*l.*, and agreed and also sealed a deed for the absolute sale thereof, if the money were not paid at the end of seven years (*q*); a redemption was decreed notwithstanding; for the defendant's father, having exhibited a bill against the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being so at first, the subsequent agreement could not alter it (*N*).

Agreement restricting redemption to seven years, void.

(*q*) *Bowen v. Edwards*, 1 Rep. Ch. 222. 13 Car. 2.

(*N*) But although a mortgagee cannot by any stipulation contained in the mortgage deed, or in a separate deed made at the same time as the original mortgage, and being, in fact, part of the same assurance, retain to himself the collateral advantage of becoming the purchaser of the estate at a given definite price, then fixed on to be paid to the mortgagor in case he shall not redeem within a limited time, yet the mortgagee may become the purchaser of the equity of redemption if he does not make use of his incumbrance to influence the mortgagor to part with the estate for less than its real value. *Wrixon v. Cotter*, 1 Ridgw. 295. If, however, the mortgagee does purchase the equity of redemption, he should always pay a valuable and indeed an adequate consideration for it. In *St. John v. Turner*, 2 Vern. 418, it was said to be a great objection to the transaction in question, that the plaintiff appeared to pay nothing for the equity of redemption, but that it was thrown into his bargain.

Mortgagee may purchase estate of mortgagor.

It seems admitted that the mortgagee may insert a clause in the mortgage deed, entitling him to pre-emption in case the mortgagor should be desirous of parting with the estate, *post*, 125 a; and a purchase, without such a previous right reserved, would, it should seem, be considered as much the same thing. In both instances the mortgagor is perfectly free, and at liberty to make the best bargain with the mortgagee he can. And therefore if he sells the estate to the mortgagee for even less than its value, it is apprehended, a court of Equity would not afterwards relieve him if there were not any circumstances of fraud or indirect influence apparent on the transaction. In one case Lord Redesdale said, if there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them, and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him by applying the purchase-money to pay off the mortgage. It can therefore only be for want of a better purchaser, that the mortgagor can be compelled

Mortgagee, with power of sale, sells, excepting mortgage, this continues it.

And although a mortgagee have a power to mortgage or to sell the lands mortgaged absolutely (r), in case of failure of

(r) Vide the case of *Croft v. Powell*, supra, 10.

to sell to the mortgagee; but courts view transactions, even of that sort, between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbency, the mortgagee has purchased for less than others would have given. *Webb v. Rorke*, 2 Sch. & Lef. 673. *Gubbins v. Creed*, Ib. 218; and see 1 Ball. & Bea. 164. 2 Eden Rep. 110. Perhaps the observation, that "courts view transactions, even of that sort, between mortgagor and mortgagee with considerable jealousy," puts the doctrine higher than one could wish to see it stand. A sale by a mortgagor to a mortgagee, stands on the same principle as a sale between parties having no connexion with each other, and can only be impeached on the ground of fraud. The mere circumstance, that the mortgagee purchased for less than another would have given, could not, it is apprehended, of itself be a sufficient ground to impeach a sale; and Lord Redesdale, in stating the case above alluded to, said, that it contained "circumstances of misconduct in obtaining the purchase." The case of *Gubbins v. Creed* was a case of clear fraud and contrivance. The mortgagor was out of possession, and at the time the transaction took place, the mortgagee was accompanied by a man who had a writ against the mortgagor for 400*l.* at the suit of an uncle of the mortgagee's. The mortgagor was arrested, but the debt was never afterwards demanded. It was therefore a plain case of duress. 2 Sch. & Lef. 223. Et vide 1 Anstr. 138, et post, 169, note (S).

Mortgagee may purchase entire equity of redemption of mortgagor, but not a partial interest, without its being subject to review.

By a subsequent case in the House of Lords, this point is now set at rest, and the principle, that a mortgagee may purchase the equity of redemption of the mortgagor, is clearly established. The case alluded to is that of *Hicks v. Cooke*, 4 Dow's Par. Ca. 16. In that case, the contract between the mortgagor and mortgagee, was for a partial interest in the premises, and not for the entire equity of redemption. It was for a fee farm rent of 80*l.* a year; and the interest on the mortgage was 40*l.* per annum; so that after retaining the interest, the rent was 40*l.* A transaction of this sort, said Lord Eldon, ought certainly to be looked at with a great deal of jealousy, and courts of Equity do regard such transactions with a great deal of suspicion; though, if they should appear to be perfectly fair, they cannot be set aside merely because they are foolish. And, per Lord Redesdale, in the same case, a transaction of this kind, if recently impeached, should be set aside, for it not only has the effect of procuring the mortgagee an advantage beyond the legal interest of the mortgage money, but it also encumbers the equity of redemption, for the mortgagor will have nothing to sell to redeem the mortgage but the fee farm rent. A bill of foreclosure may be filed against him, the expences of which he will have to pay, and unless he can sell the rent to as much advantage as he could the lands without that burden, he will suffer a loss by the transaction. The only proper principle is this, that although a mortgagee may, without imputation, contract for the purchase or release of the equity of redemption, no agreement between the mortgagor and the mortgagee, for a beneficial interest out of the

payment at a given time, a court of Equity will, nevertheless, consider any conveyance by him to be subject to redemption,

mortgaged premises, (such as a lease) while the mortgage is continuing, ought to stand if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party. If he purchase the equity of redemption, there cannot be any objection to that sort of contract. But the mortgagor holding it still, and the property being reduced in value to a fee farm rent, so that by the incumbrance on the reversion, the mortgagor is disabled from redeeming so well as if that had not been done, and he being liable to have a bill of foreclosure filed against him, and to an action for the mortgage-money, such a transaction ought not to stand. And his Lordship added, that nothing in the case in appeal, but the length of time the mortgagee had been in possession, and the acquiescence of the father and son in that possession for nearly fifty years, would have induced him to vote for the affirmation of the decree and the validity of the grant of the fee farm rent from the mortgagor to the mortgagee.

The principle tending to disqualify the mortgagee from purchasing the equity of redemption arose from the consideration of the relation which subsisted between him and the mortgagor, and of the possibility that one who had the power would too readily be seized with the inclination to serve his own interest at the expence of a distressed and unwary debtor. And the spirit of this principle is, it seems, still applied to the case of an attorney taking a mortgage from his client for past and future costs in a suit. *Dalby v. Kelly*, 4 Dow. Par. Ca. 417. In such a case it behoves the attorney to shew (other than by the securities) the real nature of the transaction, and what sums were actually advanced. The mortgage, however, is not absolutely invalid, it is only looked at with great jealousy. *Morgan v. Lewis*, 4 Dow. P. C. 51, 3. Et vide *Langstaffe v. Fenwick*, 10 Ves. 409. S. C. *infra*, 297, n. (E), sec. iii. 2; also vol. ii. 1064. Attorney and client.

The rule is, not that a trustee is precluded from purchasing from the *cestui que trust*, but that he shall not purchase from himself. The *cestui que trust* may, by a new contract, dismiss the trustee, and then the latter may purchase, but even that transaction will be watched with the most guarded jealousy. *Lacey Ex parte*, 6 Ves. 625. Yet in *Downes v. Grazebrook*, 3 Meriv. 200, where an estate was conveyed to D. by way of security for the re-investment of a specific sum of stock, and for payment of the dividends in the mean time, with a power of sale in case of default, it was held, that if D. exercised his power of sale he would be a trustee for the party making the conveyance, and as such disabled from purchasing for himself without the consent of the *cestui que trust*. The estate in this case had been put up to sale by auction, at which C. as agent for D. was the only bidder, and it was knocked down to him accordingly; but the sale was decreed not to stand, although no evidence was adduced of fraud or undervalue.

Where a mortgagee sells under the general order in bankruptcy, *infra*, 1081, it is usual to apply for leave for him to bid at the sale, if he intends to do so; for, in such a case, he may fairly be considered as the seller, and he cannot, with- Mortgagee buying estate of bankrupt mortgagor.

if it be evident from the *res gestæ*, that the vendee did not depend upon the power; as if the equity of redemption be excepted in the conveyance (o).

Agreement by
creditors and
assignees of
mortgagee to re-
strain redemp-
tion, void.

[125]

Nor will any subsequent agreement, entered into between the assignees of the mortgagee and other persons, though creditors of the mortgagor, to restrict the period of redemption, alter the nature of a contract, originally founded on a mortgage. Thus, where one creditor (lands mortgaged, or the equity of redemption of them being subject to debts, and the mortgagee having exhibited a bill to redeem, or be foreclosed), undertook to redeem, entering into an agreement with the other creditors, that, if they paid him the money at a day appointed, they should redeem, otherwise the lands should be his absolutely (s). Though the creditors failed to pay the

(s) *Exton v. Greaves*, 1 Vern. 138. *infra*.

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continued.

out the leave of the court, sustain the two characters of seller and buyer. *Marsh Ex parte*, in *re Carrill*, a bankrupt, 1 Madd. Rep. 148: the reporter referring to a short note of a case in Hilary Term, 1806, wherein it was decided, that under an order in bankruptcy, for the sale of a mortgaged estate, the mortgagee may become the purchaser, and come in under the commission for so much of the mortgage money as should not be raised by the sale. But where the mortgagee was sole assignee, and there was but one other creditor to a small amount, the court would not permit the mortgagee to bid for the estate, except on condition that, if he were the purchaser, he would undertake to pay the deficiency between the sum offered and the price fixed on by the master, if the master should think the sum offered by the mortgagee below the value of the estate. *Ex parte Bunn*, in *re Salisbury*, 1 Buck. B. C. 245. As to re-opening biddings in these cases, see *infra*, 1016, n. (T).

Absolute conveyance, with power of sale, implies mortgage, and till sale, grantor may redeem.

(O) Another case on this subject is that of *Jackson v. Vernon*, 1 H. Bl. 114. There A. the owner of a ship, executed an absolute bill of sale of it to B., and by another deed of the same date assigned other property to B., which latter deed of assignment, (after reciting that the bill of sale of the ship was for the better securing a sum of money lent by B. to A., and also reciting a bond and warrant of attorney given by A. to B. to secure the same sum) declared that these several deeds and instruments were made to enable B. by sale of all the things comprised in them to raise the sum lent, without the concurrence of A., at any time before the money should be paid off; but in the same deed there was a covenant that, upon payment of the money, B. should reconvey to A., nevertheless so as not to prevent B. from selling, &c. Under these conveyances B. was held to be mortgagee, and not absolute owner of the ship. See also *supra*, p. 10, and n. (K), p. 17.

money at the time agreed upon, yet, upon a bill exhibited by them afterwards, a redemption was decreed.

And it seems questionable whether a power of redemption can be set up upon a subsequent parol agreement, made after an absolute conveyance executed; for if it be a mortgage, it must be so *ab initio* on the original agreement. And, therefore, where one having the reversion expectant upon the determination of a lease for life, in an estate worth 1000*l.* *per annum*, conveyed it in fee to W. R. in consideration of 1000*l.* and no more, and the tenant for life died, a pretence was set up that this conveyance was no more than a mortgage, because W. R. had declared *that he did not* know how long he should enjoy the estate, and that he would take his money again with interest (*t*); *sed dubitatur per curiam*; and one reason was, because matter subsequent will not make it a mortgage, if it was not so upon the original agreement (*P*).

Matter subsequent will not make that a mortgage which was not so originally. Samb.

(*t*) Vide *Coplestone v. Boxwill*, 1 Ch. Ca. 1. 3 Salk. 241.

(*P*) But it seems admissible to shew, that the mortgagee held as mortgagee, see, on this subject, *Whiting v. White*, Coop. Rep. 6. *Barron v. Martin*, Ib. 192. Et *infra*, 147. 381.

In determining whether a conveyance, which on the face of it appears to be an absolute conveyance, shall be considered as an unconditional sale or as a security for money, courts of equity look to the circumstances with which it is attended. If the money paid by the grantee be not a fair price for the absolute purchase of the estate conveyed to him, especially if it be grossly inadequate, *infra*, 337, if he be not let into possession of the estate immediately after the pretended purchase—if, instead of receiving the rents for his own benefit, he accounts for them to the grantor, and only retains the amount of the interest—if a collateral security, as a bond, judgment, or warrant of attorney be given at the same time for further securing the supposed purchase money (2 Sch. & Lef. 393,)—or if the expence of preparing the deed be borne by the grantor—each of these circumstances will, in the consideration of a court of equity, tend greatly to prove that the conveyance was intended as a security for money only, and not as an absolute sale. Et vide *Price v. Perry*, 2 Freem. 258. *Vernon v. Bethell*, 2 Eden, 110. *Harris v. Horwell*, Gilb. Eq. Ca. 11, as to the mortgagor's retention of possession after an absolute conveyance. In *Sevier v. Greenway*, 19 Ves. 413, several instruments were construed into a mortgage, though one of them imported to be an absolute conveyance; et vide 2 Fonb. Tr. Eq. 261, 2. Ante, 120, *infra*, 138, *in notis*. A mortgage, however, will not easily be presumed against an absolute conveyance, if the possession has gone along with it; but parol evidence will be

What circumstances will convert absolute conveyance into mortgage.

But right of pre-emption may be reserved to mortgagees. Semb.

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But although courts of equity will not suffer the mortgagee to clog the redemption with any stipulation for a purchase, at a specific price agreed upon *at the time of the loan*, because the admission of such a practice would furnish an inlet to great fraud and imposition upon the mortgagor; yet, I apprehend, a mere agreement, that in case of sale, an opportunity of pre-emption should be given to the mortgagee, would be decreed; but it must be claimed at a reasonable time (*u*); for, where A. the plaintiff's brother, died, having previously mortgaged lands to B. by deed, containing covenants to re-convey upon six months notice of payment of the principal and interest, and that in case the estate should be sold, B. should have the pre-emption; B. got the counterpart into his hands after A.'s death; then the plaintiff gave him six months notice that he would pay off the mortgage, which he refused to accept; upon which the plaintiff exhibited his bill for a re-conveyance of the estate, having entered into articles for the sale of it. B. in his answer, insisted on the covenant for pre-emption; but it appearing that neither the plaintiff nor the purchaser knew any thing of this covenant, the counterpart of the deed having been in B.'s custody; that the plaintiff, on application for it, had been denied it, the mortgagee insisting only on payment, alleging the security was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the estate was sold; it was said, he ought not to set it up to the prejudice of the purchaser, having had time to claim it, if he had pleased, before the estate was sold; and it was decreed accordingly.

Subsequent agreement for absolute purchase, with proviso for re-conveyance, valid.

A distinction hath been made by the Court of Chancery (*x*), between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain

(*u*) *Orby v. Trigg*, 2 Eq. Ca. Abr. 599. 24. S. C. 9 Mod. Ca. in Law and Eq. 2.

(*x*) *Barrell v. Sabine*, 1 Vern. 268.

admitted to shew or explain the real intention and purpose of the parties. *Maxwell v. Montacute*, Pr. Ch. 526. *Walker v. Walker*, 2 Atk. 98. *Joyes v. Statham*, 3 Atk. 388. Post, 151. And as to conveyances by expectant heirs, see ante, 17 b.

event, and cases where, after a mortgage, a new agreement hath been entered into and executed by the parties for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of interest, principal, and costs; or, where a release of the equity of redemption is given with a collateral agreement to re-convey, upon re-payment of the purchase money; and, in the latter cases, it hath been determined that no re-purchase shall be had, unless upon strict performance of the conditions stipulated.

Agreement after release of equity of redemption to redeem at time certain, good.

Thus, where A. a joint-tenant with B. her sister, made an absolute conveyance to C. in fee, for 104*l.* which was admitted to be intended only as a mortgage (*y*); some time after, in 1708, those deeds were cancelled, and then A. in consideration of 184*l.* (including the 104*l.* paid by C.) conveyed the estate *at supra*, but with a farther covenant not to agree to any partition without C.'s consent. B. was in possession till 1710, when C. ejecting her out of the moiety, enjoyed it quietly till 1726, at which time A. brought a bill for redemption, to which C. pleaded himself an absolute purchaser. The receipts given for the money, mentioned it to be purchase money. In 1710, there was an agreement that A. might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards it came on before Lord Chancellor Talbot, who observed the case was very dark; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed not to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question; that he was inclined, upon the whole, to think the conveyance in 1708, was at first an absolute convey-

Mortgage not easily presumed against absolute conveyance, especially after sixteen years possession under it, although there be a covenant that A. shall have estate again on payment of principal and interest.

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(*y*) *Cotterell v. Purchase*, Ca. Temp. Talb. 61.—[1 Eden Rep. 55. 169. Ante, 120. 125 a, in notis.—Ed.]

ance. The agreement in 1710, for the re-purchase, shewed that it was not redeemable at first; the acquiescence of sixteen years under C.'s possession, was a strong evidence of it; and his Lordship, upon the circumstances of the case, affirmed his Honor's decree.

Release of equity of redemption, with a note, that on payment of a sum, releasee shall reconvey within a year, redemption refused after sixteen years.

So, where lands in Wales were mortgaged for 400*l.* and upwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment (z), got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the release, that the releasee, on payment of the 750*l.* and all charges of repairs within a year by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.

Agreement restricting redemption to time certain, good, if between members of same family.

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Transaction cannot be mortgage at one time, and sale at another, by same deed. Ante, 116 a.

We must remark here also, that if the transaction passes between persons of the same family, and there appears upon the face of the contract, or in proof, an intention, in a certain event, to benefit the lender of the money, the contract will be considered as wearing a kind of double aspect, and the court will support the intention of the parties to turn a mortgage into a purchase in a certain event, though contrary to the general rule; for, in such a case there is no danger of any fraud or practice against the mortgagor, which is the mischief intended to be prevented by a strict observance of the maxim in equity, *that an estate cannot be a mortgage at one time, and an absolute purchase at another*. Thus, where one seised in fee, in consideration of 1000*l.* paid to him by a person that married his kinswoman, conveyed to him and his heirs, and took a re-demise for ninety-nine years, if he should live so long, with a covenant therein, that if he should pay 1000*l.*

(z) *Endsforth v. Griffith*, 15 Vin. ed. 184. *Vernon v. Bethell*, 2 Eden Abr. 468, pl. 18. 2 Eq. Ca. Abr. 595, Rep. 110, ante, 120, in notis.—Ed.] pl. 6. 1 Bro. Par. Ca. 149. [5 Toml.]

with the interest that should be due for the same at any time *during his life*, the mortgagee should re-convey to him and his heirs; and, *if the mortgagor did not pay the money, then his heirs, &c. should have no power to redeem*; the mortgagor died, the money not being paid. His heir preferred a bill to redeem, and, at first, it was so decreed by Lord Nottingham (a). Afterwards the cause came on again, upon a demurrer to a bill of review, to reverse that decree. It was argued for the demurrer, that an estate could not be a mortgage at one time, and afterwards become an absolute purchase by one and the same deed; that the mortgagee, in this case, had a proper remedy, and might have made his estate absolute in a legal course, by exhibiting a bill to foreclose; but the court inclined to reverse the decree.

And this cause coming on *de integro*, the Lord Keeper [North] adhered to his former opinion, that there ought to be no redemption (b); principally, because it was *proved in the cause*, that the design of the mortgagor was to make a settlement by this mortgage, and that he intended a kindness and benefit to the mortgagee, in case he should not think fit to redeem in his life-time. And as there was an express covenant that the mortgagor might redeem at any time during his life, his Lordship thought he could not in equity have been debarred of that privilege, for, by a bill to foreclose a man, you could only bar him of his equitable title when his estate, in law, was become forfeited; but when he had a continuing title at law, as in this case, by an express proviso that he might redeem at any time during life, he thought equity could not have debarred him of that privilege. And, therefore, seeing the mortgagee, in the present case, could not have compelled the mortgagor to redeem, and that the mortgagor might have lived so long as to have made it an ill bargain, then, when by contingency it happened to be a good bargain, there was no reason to raise an equity to take the estate from the mortgagee, especially where there was a kindness and benefit intended him by the mortgagor. And Lord Nottingham's decree was re-

Except where mortgagor intends to benefit mortgagee.

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(a) *Bonham v. Newcomb*, 2 Vent. 58. 159. [Et vide Finch, 226.—Ed.]
364. 1 Vern. 7. 214. 232. 2 Ca. Ch. (b) 1 Vern. 232.

versed, and the reversal afterwards affirmed in parliament held 1 & 2 W. & M.

And intention to benefit may be proved by parol.

So, if a man borrows money of his brother, and agrees to make him a mortgage; and, that if he has no issue male, he shall have the land; such an agreement, *made out by proof*; might be decreed in equity (c).

Redemption cannot be restrained among strangers; secus if mortgage be part of family arrangement.

Another exception hath been made to this general rule; namely, when a conditional conveyance is made, to be void upon payment of a sum certain, within a stipulated time, in contemplation of a settlement, or family provision (d). As where A. seised of a copyhold in fee, surrendered it, upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain, to the daughter that the wife had, then the whole surrender should be void. The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice; and it was resolved, that this was not originally designed for a mortgage, but that the party by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand; he had chosen the latter, and the plea was allowed.

Testator devised lands in mortgage, to his wife, who paid off money, and took assignment, heir cannot redeem.

So, where one (e), upon his marriage, covenanted that his wife should be paid 1000*l.* within two years after his death, and for performance thereof entered into a statute; but prior to the covenant and statute, had mortgaged part of the lands for 500*l.* for certain years. Afterwards he devised these lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage covenant, she paying off the said 500*l.* He died, leaving his wife executrix, to whose hands assets came; the 1000*l.* not being paid to the wife, she paid off the 500*l.* and had the mortgage lands assigned to her. She

(c) 1 Vern. 193.

(e) Sir Nicholas Wolston v. Aston;

(d) King v. Bromley, 2 Eq. Ca. Hardr. 511.

Abr. 595, c. 8.

then conveyed over the mortgage lands in fee by fine and deed. The question was, whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with interest upon discount of the profits? And the Lord Chief Baron was of opinion he could not; for the devise to the wife was absolute if the 1000*l.* were not paid at the time appointed.

A distinction hath been likewise taken, between mortgages and defeasable purchases, subject to re-purchases within a *time limited*, where the interest is taken by way of rent-charge; for, in the latter cases, the stipulations made between the parties, must be strictly adhered to, or the estate of the grantee will become absolute. If it were otherwise, it would make property very precarious: for if, after the term agreed upon, the estate were to be considered as a redeemable interest, then it would be only a personal estate; but, if considered as absolute, it would be a freehold, and must be conveyed as such. This would create great confusion, and render it very difficult for persons either to dispose of such property, or to settle what kind of conveyance was proper.

Distinction between mortgage and sale with power to re-purchase (Q).

Thus, where I. S. (*f*) granted a rent-charge in fee of 48*l.* a year to B. upon condition, that if I. S. should, at any time, give notice to pay in the consideration-money (being 800*l.*) by instalments, viz. 100*l.* at the end of every six months; and should, pursuant to such notice, pay the same and interest, *at any time during his life-time*, then the grant to be void. There was no covenant for I. S. to pay the money, and the rent-charge was much less than what the interest came to (interest then being 8 *per cent.*) B. had conveyed it over after I. S.'s death to a *purchaser with collateral security* for quiet enjoyment, and the *purchaser* had afterwards made a marriage settlement upon it. The question was, whether it was redeemable after sixty years? And it was decreed by Lord Cowper, that it was not. His Lordship observed, it was material that at the time of

*A. grants B. an annuity of 84*l.* a year, for 800*l.* on condition to be void if grantor should within his life-time, give notice and pay in the 800*l.* Bill by heir to redeem dismissed.*

(*f*) *Floyer v. Lavington*, 1 P. Wms. 268.

(Q) See the modern cases on this subject collected in note to pages 138 a, 139, *infra*.

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making the mortgage, interest was at 8 *per cent.*; the rent-charge, therefore, was much less than the interest of the money; consequently the payment of the rent-charge could not be taken as the payment of the interest: that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that *the mortgagee seemed to have allowed a consideration* for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48*l. per annum*; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased: that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

The reporter observes upon the last case, that it was thought length of time was the principal objection to the redemption; but in the case of *Mellor v. Lees* (g), which came on before Lord Chancellor Hardwicke, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather re-purchase, were legal, was confirmed (R).

*A. mortgaged to B. in fee for 200*l.* B. leased to A. for 5000 years at a rent of 10*l.* on condition to reconvey fee, if 200*l.* were paid in three years.*

In this case a mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead; the Whiteheads afterwards, on the 5th of June, 1689, mortgaged the same estate to Cartwright and Haywood, and their heirs, for securing 200*l.*, to which Thomas and his son, John Mellor, were parties; and Cartwright and Haywood, in order to secure themselves the interest, made a lease to the

(g) 2 Atk. 494.

Re-purchase.

(R) The case of *Mellor v. Lees* also turned greatly on length of time. It is, however, now clearly settled, that a *bonâ fide* purchaser of an estate will not be considered as a mortgagee on account of a right to re-purchase being reserved to the vendor, though at an advanced price. *Batl. Co. Litt. 205 b. n. 1. s. 2.* *Infra*, 138 a, 139, note (T).

plaintiff's father and to his assigns, dated the 12th of June, 1689, for five thousand years, at the rate of 12l. a-year, for the three first years, and 10l. a-year for the remainder of the term; *and if, in the space of three years, the 200l. was paid with interest, then the premises were to be re-conveyed.* Receipts had been given sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730. The 200l. lent was money left under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee, in Lancashire or Cheshire; the rents to be applied towards clothing twenty-four aged and needy house-keepers. The estate, at the time of the mortgage, was worth 500l. only, but was now valued at 900l. The plaintiff, on the 20th of January, 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by For-tescue, Master of the Rolls, from which decree there was now an appeal made to the Chancellor. His Lordship said there were two general questions in the case. First, as to the contract, whether the transaction was, in its nature, a mortgage, or a defeazable purchase, and subject to a re-purchase? Secondly, whether, if originally intended as a mortgage, length of time would not be a bar to redeeming? As to the first, there was a difference between such an agreement as this, which related to a rent-charge issuing out of land, and an agreement which related to the land itself. So also the case of creating a rent-charge, and mortgaging a rent-charge, were different considerations; when a man took a mortgage, the produce of the estate was not only barely adequate to the interest, or even to a perpetual payment of the interest, but, generally, was double the value of the interest of the money lent. If any fetters had been laid upon redeeming the mortgaged estate, *by an original agreement* either in the mortgage-deed, or in a separate deed, it would not have availed, *where it was done with a design to wrest the estate fraudulently out of the hands of the mortgagor*: but what fraud or inconvenience was there in this case? The land itself was not parted with, but it was merely selling a rent-charge strictly adequate to the consideration given; and, instead of having a chance for the whole estate, the lender was contented to buy the interest for ever

Forty-nine years elapsed: Bill by A.'s heir to redeem dismissed, because it was an absolute purchase, subject to a proviso for re-purchase in a given time.

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Fetters on redemption no avail.

by way of rent-charge. As to the particular agreement, his Lordship said, that from that, and from the articles made in 1689, it appeared plainly to be the intention of the parties, that, after the end of three years, the interest should be changed into a rent-charge, and be irredeemable. His Lordship farther said, it was material that the money left to the charity and lent was not to be laid out at interest, but to be invested in land in fee-simple; so that the trustees, being under an inability of treating in the common way, put it in this method; and the will itself laid the foundation of the transaction, and cleared the defendants from the suggestion of oppression and imposition.

Absence of covenant to pay money. No inconvenience of accounting in case of rent-charge.

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Likewise an essential circumstance in this case was, that there was no covenant in the deed for re-payment of the mortgage-money (*h*); for though, in general, this was no rule against redemptions, here it was explanatory of the whole scheme and intention of the parties. He did not found his opinion singly upon the nature of the contract, but also upon the great length of time elapsed, being forty-eight years. Not that the general rule of the court (not to suffer a common and plain mortgage to be redeemed after the mortgagee had been in reception of the rents and profits a considerable time, because it would be making him bailiff to the mortgagor, and subject to an account) applied forcibly in this case of a rent-charge; there would be no such inconvenience, for the person might easily account; but the value of property was greatly altered since 1689; therefore more might have been said, if the redemption had been proposed sooner. His Lordship concluded by saying, the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and of the similitude between it and that of *Floyer v. Lavington* (*i*).

Observations on last case. Mortgage of rent-charge, and land distinguished.

It is to be observed, upon the reasoning in this case, that although Lord Hardwicke stated the length of time, as an additional reason in support of this decree, yet he only urged it as to its operation in altering the value of the property, and

(*h*) 1 Will. 271. [Et vide S. P. 137, post.—Ed.]

(*i*) Supra, page 130, note (*f*).

not as a presumption of the grantor's having abandoned his right of redemption, if he had ever been entitled to it. And his Lordship principally determined upon the special circumstances of the contract; for, as he justly observed, length of time was allowed to be a good objection to redemption, because of the difficulty it laid upon the mortgagee of accounting, which, in the case of a rent-charge, did not exist. A distinction which had been taken before in the case of *Lord Widdrington v. Jennings*, in Lord Harcourt's time^(k), cited by Sir Joseph Jekyl in *Floyer v. Lavington*, where the court took a difference between a mortgage of a rent-charge and of land; and allowed a redemption in the former case after eighty years.

And it seems, from the determination in the case of *Tasburgh and M'Namara v. Sir Robert Echlin et al.*^(l), that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon to a particular period, would be considered in the nature of a conditional purchase, and no redemption allowed thereof, after the time stipulated (R 2).

Conveyance in fee, proviso for re-entry on payment of 200l. in five years, if not paid, estate to be indefeasible; right of redemption, in case of non-payment, released, no covenant to pay money, five years elapsed, foreclosure prayed and granted; decree acquiesced in thirty-four years; redemption [134] tion prayed and granted; appealed against and reversed, for that proviso for re-purchase was binding.

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellor of Ireland, in the year 1732, on the following circumstances, *viz.*

King James I. by his letters patent under the great seal, dated the 17th of June, 1608, granted divers lands to John King and John Bingley, and their assigns, for 116 years, to commence from the 18th of May then last past, at a certain yearly rent. The residue of which term, by deed dated the 26th of May, 1677, became vested in John Tasburgh, father of Henry Tasburgh, the appellant in the cause.

^(k) *Widdrington v. Jennings*, cited 1 P. Wms. Rep. 270.

^(l) *Tasburgh v. Echlin et al.* 4 Bro. Par. Ca. 142. [2 Toml. ed. 265.—Ed.]

(R 2) Mr. Coote, however, in his compendious and elementary volume on the subject of this treatise, submits that the case of *Tasburgh v. Echlin* was determined on circumstances so special, that it is scarcely an authority for any subsequent case, and that it is hardly applicable to the general rule deduced from it in the text. Coote Mortg. 31; but he adds "sed vide Powell on Mortgages, 4th edit. vol. i. 183;" referring to the learned author's conclusion in p. 138, *infra*.

King Charles I. by his letters patent, dated the 25th of March, 1647, granted the same premises to Sir Maurice Eustace and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years.- Sir Maurice, by his will dated the 20th of June, 1665, devised the premises, *inter alia*, to his nephew Sir John Eustace in fee; who by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the term of 116 years.

The premises being only of the clear yearly value of 200*l.* Sir John, in consideration of 200*l.* paid him by the said John Tasburgh, did by lease and release, dated the 30th and 31st of May, 1681, grant and convey the same to Charles Tasburgh and his heirs, in trust for John Tasburgh; in which indenture of release there was a proviso to the following effect, *viz.* That if Sir John Eustace, his heirs, executors, or administrators, should pay to Charles Tasburgh, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200*l.* with full interest for the same, at the rate of 10*l. per cent. per annum*, according to the custom of the kingdom of Ireland; that then it should be lawful for him and his heirs, into the premises to re-enter, and the same to re-possess and enjoy as in his and their former right. But if Sir John, his heirs, executors, or administrators, should fail in payment of the money with interest at the time limited, that then the estate of the said Charles Tasburgh should be absolute and indefeazable, as well in equity as in law; and that Sir John, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And Sir John did thereby, for himself and his heirs, release unto Charles Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the interest thereof, as is usual in mortgages.

The five years mentioned in the proviso being elapsed, and no part of the 200*l.* or the interest thereof having been paid, John Tasburgh (having no remedy at law to compel the pay-

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ment, the estate being only a reversion expectant upon the determination of a term of which there were then forty-three years unexpired) exhibited a bill, in April 1687, in the name of Charles Tasburgh, against Sir John Eustace, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of Charles Tasburgh in the premises (in case it should be adjudged to be a defeazable or redeemable estate) should be made absolute to him and his heirs; and that in that case Sir John Eustace might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said Charles Tasburgh, according to the tenor and true meaning of the indentures of lease and release.

Sir John being served with a *subpœna* to answer this bill, stood out all process of contempt to a sequestration, and in May 1688, appeared by his Six Clerk, and prayed a commission for taking his answer in England, which was granted by consent. But it was ordered, that unless the same was returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. Sir John having neglected to answer at the time limited, farther time was given him; but he still neglecting to answer, a decree was made the 11th December, 1688, that he should be foreclosed, unless the principal, interest, and costs, were paid before the 11th December, 1689.

Afterwards Sir John Eustace returned to Ireland, and lived until the year 1706, when he died without issue; but he never took any one step to impeach these proceedings or decree; or did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for eighteen years. Henry Tasburgh, the appellant, succeeded to this estate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquiescence of thirty-four years under the decree, any person would set up a claim thereto under Sir John Eustace, he by indenture, dated the 24th of April, 1722, in consideration of a fine of 300*l.*, demised the same to the appellant George M'Namara, for the term of thirty-one years, at the clear yearly rent of 250*l.* But the value of lands in Ireland rising considerably, a bill was exhibited in the Court of Chan-

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cery there, in September 1723, by several persons in right of their wives (nieces and co-heiresses of Sir John Eustace) alleging, that the bill of foreclosure was obtained by surprise, fraud, and imposition; and praying it might be reviewed and reversed.

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Afterwards, in April 1729, the appellant Henry put in a plea and answer to this bill (which having abated, they claimed a right to revive) insisting on the title as before set forth; and farther pleading the lease and release executed, in 1611, by Sir John Eustace, the declaration of trust executed, by Charles Tasburgh, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. And George M'Namara denied notice of the respondents' title, and insisted, that he was a purchaser for a valuable consideration, of his said term without any notice. But it was decreed, that upon the respondents' paying the appellant Henry the principal, interest, and costs due to him, he should re-convey the same; and as to M'Namara, an issue was directed to be tried, whether he, at any time, and when, had notice that the co-heiresses of Sir John Eustace had or claimed any and what right to the lands in question, after the lease to King and Bingley should expire.

From this decree the appeal was brought; it being insisted, on the part of the appellants, that, as the case was circumstanced, there ought to be no redemption, upon any terms whatever; it having been expressly agreed by the release, in 1681, that, if the money was not paid within five years, the estate should be irredeemable; it ought therefore to be considered as a conditional purchase, and the rather, because there was no covenant to repay the money. That, as the appellant Tasburgh, or those under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage: for, in cases of mortgages, the remedy should be reciprocal(s);

Lien in mortgage not reciprocal.

(S) It has been frequently said, that the lien in a mortgage ought to be equal, and that where one side cannot foreclose, the other ought not to be allowed to redeem. But a mortgage is not in all cases completely mutual, as in *Talbot v. Braddil*, 1 Vern. 394, where the proviso was, that on payment of

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consequently, no equity of redemption could arise or spring from the condition contained in the release; for the supposed pledge was only a reversion expectant on a long term of years, whereof no less than forty-three were then to come, during which time it could yield no manner of fruit or profit. That the 200*l.* was a sufficient consideration for the absolute purchase, according to the then value of lands in Ireland. That the decree of the 11th December, 1688, ought to be binding upon Sir John Eustace, and upon the respondents, as claiming under him. And even supposing this to be the case of a mortgage clearly and undoubtedly redeemable, yet, considering the length of time that the mortgagor, and those claiming under him, had acquiesced, without demanding such redemption, and regard being had to the other circumstances of the case, no redemption ought to be decreed.

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To this it was answered by the respondents, That upon the face of the deeds the transaction appeared to be a mortgage; that John Tasburgh understood it so to be, or he would not have brought his bill of foreclosure. That such clauses to restrain the redemption were always considered in equity as terms extorted from the necessities of the borrower, and tending to usury and oppression; that the decree in 1688 was not binding or conclusive, being obtained in the absence of Sir John Eustace, without any defence, and in time of war and general confusion; it was never completed, or the account directed taken, or the order for foreclosure made absolute. As to the length of time, it was said, that the first lease granted did not expire until 1724, which was *after* the first bill for redemption was brought; consequently Tasburgh could not be considered as a mortgagee in possession, till after the expiration of that term; for, during its continuance, he was in possession as a tenant, and not as a mortgagee. Besides, Sir John Eustace being in England from the time of making the mortgage, till near his death, and in extreme poverty, and his

the principal money in the year 1688, the estate should be redeemed or conveyed, a redemption was allowed before the arrival of the time stipulated in the proviso, but a foreclosure would not have been decreed before that period. S. P. post, 335.

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heirs at law having been under coverture or infancy from that time to the time of filing their bill in 1723, which was before the reversionary estate came into possession, no laches or delay could reasonably be imputed to them. As to M'Namara, it was said to be proved by the respondents, that the premises were of the yearly value of 900*l.* and that the only consideration for his lease was a fine of 800*l.* and an annual rent of 250*l.* and that it appeared in the cause, that he had notice of the respondent's title, previous to his taking the lease; and that *covenants* were inserted therein for bearing the loss in case of an eviction; for which reasons it was hoped the appeal would be dismissed with costs.

But it was ordered and adjudged, that the proceedings, orders, and decrees, therein complained of, should be reversed, and the respondents' bill dismissed.

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I thought it necessary to state the reasons offered by the parties to this appeal rather at large, because a satisfactory answer being given to the arguments of the appellants, founded upon the length of time that had elapsed since the decree for foreclosure, upon the decree itself, and upon the purchase of M'Namara, the case appears to me to turn abstractedly upon the question of the legality or illegality of the proviso for a repurchase. And, indeed, if the order for foreclosure had even been made absolute, I apprehend it would have made no difference in the case, had the transaction been adjudged a mortgage, and the proviso been considered by the Lords as inserted with a view to restrain the equity of redemption; because, in such case, the original agreement would have been considered as fraudulent, and the artifice of adding the sanction of the court to the transaction, would only have made the conduct of the parties appear in a more criminal view.

Intention of parties to repurchase must be plain.

But in all these cases where the equity of redemption is rebutted by agreements of this kind, and the transaction is considered as a conditional purchase, the intention of the parties at the time of contracting must, I apprehend, be clearly proved, or necessarily implied, from the circumstances attend-

ing it, otherwise the general rule will not be departed from (T).

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(T) It seems clearly deducible from the observations of Lord Redesdale, in *Verner v. Winstanley*, 2 Sch. & Lef. 393, that a proviso for re-purchase will not, of itself, be sufficient to turn a *bond fide* purchase into a mortgage, though it be limited to be exercised within a certain time, and at an advanced price; and such appears to be the present received opinion of the profession. Butl. Co. Lit. 205 a. n. 1. s. 2. Sugd. V. & P. 223, 5th edit. Coote on Mortg. 33. If, however, the purchaser, instead of taking the risk of the contract upon himself, takes a security for the repayment of the principal money, or if, from a view of the whole circumstances, the transaction in the first instance appears to have been intended as a mortgage with a proviso for a reconveyance merely within a certain time, such circumstances will vitiate the sale, and turn the absolute conveyance into a mortgage, and the proviso will be rejected as repugnant, on the rule of equity, that the right of redemption cannot be limited or restrained, ante, 125 a, in notis, et vide 130. In *Verner and Boyton v. Winstanley*, ubi supra, the plaintiff B. having become embarrassed, applied to the defendant to lend him 300*l.* and to take an assignment of a rent-charge of 50*l.* year, of which B. was possessed, for the same. The defendant consented to the application, and the assignment was executed in December, 1786, with a covenant, providing that B. should be at liberty at any time to re-purchase and re-assume the rent-charge, on giving three months notice of his intention, and paying the sum of 350*l.* and all arrears. The plaintiffs also executed their joint and several bond to the defendant, in the sum of 700*l.* conditioned for the payment of the said sum of 350*l.* on the 10th of August then next; and conditioned also for the regular and punctual payment of the rent-charge. The Lord Chancellor considered the deed of assignment as a security given upon a loan. He did not think that the clause of redemption of itself would have had the effect of turning the transaction into a loan, nor did he lay any great stress on the additional sum of 50*l.* to be paid on a re-purchase (although a similar circumstance, his Lordship said, appeared from the printed report of *Lawley v. Hooper*, 3 Atk. 278, to have been one of the grounds of Lord Hardwicke's decree). What vitiated the transaction was, the defendant not taking on himself the whole risk of the annuity, but securing himself by the bond for 700*l.*—See, on the same subject, *Gifford v. Hort*, 1 Sch. & Lef. 407.

Proviso for re-purchase allowed.

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In the case of *Longuet v. Scowen*, 1 Ves. sen. 406. it was said to be a well known rule that the court lean extremely against contracts with liberty to re-purchase, where the proviso for re-purchase was introduced in the original grant as part of the same transaction; the court going very unwillingly into that distinction, and endeavouring, if possible, to bring them to be cases of redemption. This latter part of the rule implies, that it is possible to reserve an express power of re-purchase, if it be not vitiated by fraud, nor contaminated with circumstances involving the conclusion, that the grantor understood he was entering into a contract, not for an absolute sale, but for a sale retrievable on payment of the money advanced by the grantee. The rule was

Court against provisos for re-purchase.

Devise to charity by mortgagee in possession of mo-

It was held, in the case of *The Attorney-General v. Meyrick* (2 Ves. 44), that a devise of a mortgage was expressly within the meaning and provision of the mortmain act, 9 Geo. 2. (u).

certainly attended to in the decision of the earlier cases, but at the present day (it is presumed) it would have little or no weight with the court.

The covenant for the payment of the money at the stipulated time has been much relied on as evidence of a loan, which therefore, in all transactions of this nature, should be omitted. The words "redemption" and "re-purchase," may be used promiscuously. Lord Hardwicke said, there was little difference between the meaning of them. 3 Atk. 278. But for the sake of keeping things distinct in terms which are distinct in substance, they may be appropriately used to distinguish between mortgages and sales which are conditional, without being subject to redemption. And see 1 Ves. sen. 406. Forms of conveyances, with provisos for re-purchase, will be found in the Third Volume.

Found for most part in annuity deeds.

The proviso for re-purchase has obtained more in annuity-deeds than in any other species of assurance. It is there a common provision, though it was formerly conceived that it vitiated the annuity by converting the sum advanced into a loan at usurious interest. See *Lawley v. Hooper*, 3 Atk. 278. Since, however, the proviso is solely for the advantage of the grantor, by allowing him to extinguish the annuity at pleasure, without enabling the grantee to compel the redemption of it, it is now fully established that such a proviso will be strictly legal. See *Murray v. Harding*, 2 Bl. Rep. 859. S. C. 3 Wils. 395. *Irnham v. Child*, 1 Bro. Ch. Ca. 92. 2 Ib. 219. Et vide 6 Ves. 274. 8 Ves. 137. 1 Pr. Wms. 268. Amb. 245. 1 Ves. sen. 204. For a distinction between a loan and a rent-charge, see *Danby v. Reed*, Finch, 226.

Conditional sale.

But although any fetters laid on redeeming a mortgaged estate by some original agreement either in the mortgage-deed, or in a separate deed, will not avail where it is done with a design to wrest the estate fraudulently out of the hands of the mortgagor; yet if on money advanced an estate be leased for five hundred years, at a certain rent for the three first years of the term, and at another rent for the remainder of the term, with a proviso, that if at three years end the money advanced and interest be paid, then the premises shall be re-conveyed; this will be a good conveyance; and if the money be not paid according to the proviso, the premises granted will, it has been held, be irredeemably vested in the party. *Mellor v. Lees*, 2 Atk. 494. Etiam ante, 151. So if the grantee of lands, subject to a limited power of redemption, have not all the remedies of a mortgagee, the conveyance will not be considered as a mortgage, but as a conditional sale, as where lands were conveyed in lien and satisfaction of a portion charged on them, with a clause of redemption, if the portion were paid in ten years, there being no covenant for payment of the portion nor any collateral security, a redemption was refused after ten years; for if the produce of the sale of the lands were insufficient to discharge the portion, the grantee could not have any remedy against the grantor to recover the deficiency. *Goodman v. Grierson*, 2 Ball. & Bea. 274. See other instances of conditional sales, *Cary v. Pulford*, Pr. Ch. 95. *Howell v. Price*, Ib. 424. 2 Atk. 294.

Mortmain act.

(U) By the third section of this act (9 Geo. 2. c. 36.) it is enacted, that all

That was an information to have a charity established, and carried into execution. The facts were, that one being in possession, under a judgment and writ of *habere facias possessionem*, of lands mortgaged to him in fee, made his will, and reciting therein that he was possessed of certain sums of money due by mortgage and other specialties, gave the money in any wise due by mortgage, notes, or otherwise, on the estate of the mortgagor, whereof he was possessed, by *habere*, &c.; and all his personal estate, in trust to pay his debts, legacies, &c.; and afterwards, that the trustees should settle a place for the schooling and teaching so many poor boys, clothing them, &c. and to pay the master for such teaching, as the interest of the money he was possessed of, by securities on the estate, late of the mortgagor, would support and maintain: and he devised them all the money due on that estate, to be laid out at interest on good securities, to apply the interest thereof to the maintenance of the said school for ever. On the part of the charity it was urged, that the mortgaged premises were not devised, but only the money due by mortgage, and that the heir at law of the testator ought to be a trustee for the charity: that it was only a devise of the beneficial, not of the legal interest which descended to the heir: that the lands were alienable, and this was given as money, not as land. *Sed per* Master of the Rolls: The distinction made on the part of the relator, between a devise of mortgaged premises, and of the money due on mortgage, did not seem well founded. By a gift of all one's mortgages to A. the whole beneficial right passed to him;

nies due on securities within statute of mortmain, and void. See Exception, post, 143 a.

gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate or securities for money to be laid out or disposed of, in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting, or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the 24th day of June, 1736, be made in any other manner of form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void. See next note for the exposition of this clause of the act, as it relates to mortgages.

Mortmain act. and were the legal interest either in the heir or executor, as it was a mortgage in fee or term for years, each would be considered as trustee for A. who would be permitted by the court to use their names to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, *then* it would be equally so, though the phrase used was *money due on mortgage*; in which case, unless the court construed it to pass the whole interest of the mortgagee, it would make it in effect a void devise, or, at least put it in the power of a third person, whether the devisee should take thereby, or not. [141] The question then was, Whether this was within the mischief intended to be prevented by the statute? He was of opinion that this devise came within the express words and plain intent thereof. The design of the act was to lay a restraint on every method whereby land might possibly come into such hands, unless by the manner therein prescribed: the parliament had therefore, by express words, taken this case of a mortgage in the third clause, the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in: the meaning was, that you should not give to a charitable use, that which was, or might be, charged on land, though not so at the time of the gift. Though by the first clause securities for money were allowed to be given under the requisites of the act, yet the subsequent words of that clause afforded an argument, that mortgages *affecting lands actually* at the time of the gift, would not come within the meaning, as there might be other securities for money not immediate liens on lands, as debts, bonds, &c. He should think, on the first clause, mortgages were prohibited: but if doubtful on the first clause, the words of the third clause took them in expressly. The information, therefore, must be dismissed (v).

What dispositions within mortmain act.

(V) All dispositions (with some exceptions mentioned in the act) of real estate to charity, and of personal estate connected with land, as leaseholds, mortgages, and money to be laid out in land, are rendered void by the statute of Mortmain, whether the charity be in England, Scotland, or elsewhere. *Per cur. Curtis v. Hutton*, 14 Ves. 537. *White v. Evans*, 4 Ves. 21. But money may be bequeathed to be laid out in land abroad for the maintenance of a fo-

foreign charity, or for a charity in Scotland. 14 Ves. 540. *Oliphant v. Hendrie*, 1 Bro. C. C. 571. *Mackintosh v. Townsend*, 16 Ves. 330. *Attorney-General v. Lepine*, 19 Ves. 307. Nor does the act extend to the Colonies, it being held, that land there may legally be devised to a charitable use, the Mortmain act being one of local policy, and applicable to England only. *Attorney-General v. Stewart*, 2 Meriv. 156; et vide *Amb. 20*, and 1 Bro. C. C. 271. Where the assignment of mortgaged premises and of the principal sum due thereon to Trinity College, Cambridge, in trust for the rector of G. was void, as being executed a twelvemonth before the death of the donor, it was held not capable of being set up by reference to a will made afterwards, giving the advowson of the living beneficially to the college. *Attorney-General v. Munby*, 1 Meriv. 327; et vide further on the subject of void bequests of money due on mortgage under the mortmain act (9 Geo. 2. c. 36.) *Carrs v. Pye*, 17 Ves. 463, and *Attorney-General v. Harley*, 5 Madd. R. 321; and that parochial and paving bonds are within this act, see *King v. Bates*, 3 Price, 341. In *Attorney-General v. Harley*, money charged on land was bequeathed to A. which A. by will bequeathed to charities; after her death the charges on the land were paid off. It was held, that the monies charged on the lands did not pass to the charities, but that such bequest was void under the mortmain act. 5 Madd. 321. See also *Johnson v. Storr*, 3 Madd. 457.

It is also observable, that the bequest of a mortgage or of money due on mortgage to a charity, will be void, although the mortgage be included in the general residue. In a case in 1776 (*Attorney-General v. Martin*, cited Duke's Char. Uses, 424,) where there was a bequest of a general residue of personal estate to a charity, such as the executors should appoint, and a great part of the personal estate consisted of mortgages. Lord Bathurst held, that the bequest was void as to those mortgages, and that the next of kin should have them as undisposed of; but that the debts, &c. should be paid thereout, as being undisposed of; which last part was agreeable to a determination of Lord Hardwicke in *Attorney-General v. Tomkins*, Amb. 216. So in the case of the *Attorney-General v. Caldwell*, Amb. 635.—William Moore, by his will, bequeathed the residue of his effects, annuities, mortgages, &c. to a charity. The mortgages were for years, and two questions were made, 1st, Whether the bequest, so far as related to the mortgage, was void by the statute of mortmain. And 2d, Whether the court would not marshal the assets and apply the mortgages in the first place to the payment of debts, in order to leave the larger fund for the charity. The Master of the Rolls was clear upon the first question, that the bequest as to the mortgages was void by the statute of mortmain. The mortgages, upon which the court had given judgment, were mortgages in fee (*Attorney-General v. Graves*, Amb. 138,) and this was only a mortgage for years; but that made no difference, it was an interest in land. The case of the *Attorney-General v. Graves* was an authority that a term in gross was within the description of the statute. Upon the second question his Honour distinguished between the case where a mortgage was given as a specific bequest, and where it passed by the residuary bequest enumerated and described amongst the different species of estates of which the residue consisted. In the former case, it could not be first applied to pay debts, but in the latter it might; and his Honour gave directions accordingly that the mortgages should be first ap-

Bequest of residue (consisting in part of money on mortgage) bad, and assets not marshalled to make larger fund for charity,

Devise of residue (consisting in part of money on mortgage) to charity, good.

But see note (w), 143 a.

But Lord Hardwicke took a distinction, in the case of *Vaughan v. Farrer* (n), between that case, where a devise was

(n) 2 Ves. 182.

plied. The reporter adds a note, that this is not properly marshalling assets, but arranging the different species of personal estate. This rule, however, as to marshalling or arranging the assets does not now prevail. It was expressly over-ruled in *Attorney-General v. Winchelsea*, 3 Bro. C. C. 373. Belt's edition, where it was held, that assets should not be marshalled in favor of a charity, so as to throw the burthen of debts from personal property on chattels real. In another case (*Pickering v. Stamford*, 2 Ves. jun. 272. S. C. 4 Bro. C. C. 214,) a testator gave the residue of his personal estate to his executors for their own use and benefit, and afterwards, by a codicil, directed them to dispose of it in charities, and part was accordingly applied in founding a school. Thirty-five years after the testator's death, all the next of kin and the acting trustee being dead, a bill was filed by the representative of one of the next of kin, on the ground that part of the personal estate was secured by mortgage (therefore as to that the charitable bequest was void), and that the right of the next of kin was but lately discovered; the bill therefore prayed an account of the personal estate, and that the charitable bequest of what was out on mortgage, should be declared void, and that it should result to the next of kin. The Master of the Rolls held, that by the codicil the executors were trustees of the whole, and could not claim for themselves; that at all events the next of kin could not recall what had been laid out; that the length of time alone was not sufficient to raise a presumption that they knew their right and released it or acquiesced in it; therefore an account was decreed, but with special inquiry into all the circumstances, and whether the next of kin released, assigned, or in any manner gave up their right. The cause afterwards came on upon the Master's report, under the inquiry that was directed. 2 Ves. 582. The report stated that there were not any special circumstances affording a presumption that the next of kin had released their right, whereupon his Honour decreed in favor of the next of kin, but in exclusion of the widow. The cause was again brought before the court, on a petition of rehearing. 3 Ves. 332, when his Honour reversed so much of his last decree as excluded the widow, and decreed that such parts of the residue devised to the charity as were invested on real securities, should go according to the statute of distributions as undisposed of, viz. one half to the widow, and the other to the next of kin. See a similar point and decision in *Howes v. Chapman*, 4 Ves. 542.

Bequest to charity of money, to be produced by mortgage, of money to pay off mortgage, or of money on mortgage of rates, tolls, or canal shares, void.

The statute does not contain any express words prohibiting a bequest of money to be produced by a mortgage or sale of land for charitable purposes, but it is settled by construction, that such a bequest would come within the spirit and meaning of the act. See *Attorney-General v. Lord Weymouth*, Amb. 20, and *Curtis v. Hutton*, 14 Ves. 537. 541. So the bequest of a legacy to the trustees of a chapel to be applied by them towards the discharge of a mortgage on the chapel, will be void under the statute. *Corbyn v. French*, 4 Ves. 418. In that case the mortgage had been paid off by other funds in the testator's lifetime; but the court would not say the legacy might not have been applied in

of the *residue* of a real and personal estate to a charity, and the preceding case, in which there was a *specific* legacy of the whole personal estate, and of the mortgage *particularly* by name, which the trustees *particularly* claimed; and was of opinion, that such a devise of the *residue* to a charity would be good, although the devisor was possessed of mortgages;

sustaining and repairing the chapel, but was of opinion it could not be applied to any other charitable purpose. On the same principle the bequest of money secured on mortgage of poor rates and county rates to a charity, will fall within the purview of the statute, and be void. *Finch v. Squire*, 10 Ves. 41. So also of the bequest of money secured on navigation shares, *Howes v. Chapman*, 4 Ves. 542, or turnpike tolls, *Knapp v. Williams*, 4 Ves. 430, n. (a); for rates, canal shares, and tolls, are considered as equivalent to real estate. Where a devise or bequest to a charity is made void by the statute, the property, according to its nature, will go to the heir at law or prior devisee, or fall into the general residue for the benefit of the next of kin. *De Costa v. De Pas*, Amb. 228, and see *Corbyn v. French*, ubi supra, and *Page v. Leapingwell*, 18 Ves. 463. But where a lady made her will, and seven days after conveyed part of her property to trustees for a charitable foundation, but died before the twelve months required by the act had expired, it was held that the deed did not operate as a revocation of her will. *Matthews v. Venable*, 2 Bing. 136. Yet if an undefined proportion of a legacy is to be applied to a purpose void by the statute of mortmain, that circumstance will vitiate the whole bequest, and render the gift of the residue void for uncertainty. *Attorney-General v. Hinxman*, 2 Jac. & Walk. 277.

The mortmain act has been termed "a barbarous act;" but it is quite otherwise. It does not prohibit charitable foundations, it only restrains the creation of them by "languishing and dying persons to the disinherison of heirs." *Attorney-General v. Lord Weymouth*, Amb. 23. *Attorney-General v. Day*, 1 Ves. 223; and see *Attorney-General v. Bowles*, 3 Atk. 806. It does not prevent charity, but the abuse of it. *Smart v. Prujean*, 6 Ves. 567. If a man is charitable, and by deed conveys to a charity, he may, (*Blandford v. Thackerell*, 2 Ves. 241,) provided the deed be executed a year before the death of the grantor, and inrolled within six months after its execution. Amb. 23. Personal property may be disposed of as before the statute. See 1 Ves. 223. The particular views of the legislature were two—1st. to prevent the locking up of land and real property from being alienated, which is made the title of the act; and 2d. to prevent persons in their last moments from being imposed on to give away their real estates from their families; for, in times of popery, the clergy acquired by death-bed dispositions, nearly half the real property of the kingdom; and, indeed, says Lord Hardwicke, "I wonder they did not get the rest, as people thought they thereby purchased heaven." 1 Ves. 223.

The subject of charitable uses and bequests is fully and lucidly commented on by Mr. Highmore, in his succinct view of the History of Mortmain, 8d ed. p. 91 to 97; and the general result of that comment is collected by Mr. Fonblanque, in his Treatise on Equity, 2d vol. 214, 5th edition.

but it did not then appear to the court, that there were mortgages (w).

Mortgage not being within Statute of Frauds, parol evidence admissible to prove it, discharged.

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In the case of *Jason v. Eyres* (nn), it is said, divers proofs touching parol declarations, were offered and read on both sides, which the court would take no notice of; but this point is now settled otherwise (o), mortgages not being considered as conveyances of land within the Statute of Frauds. Thus, in the case of *Richards v. Sims* (p), where the question was, whether parol evidence could be given of the mortgagee's having discharged the mortgagor from the debt; the fact, as sworn, was, that when the mortgagor went to the house of the mortgagee with the box of writings, wherein the mortgage and the bond were, and offered them to the mortgagee, the mortgagee put the deeds back, and said, *take back your writings, I freely forgive you the debt*; and then, speaking to the mortgagor's mother, who was present, said, *I always told you I would be kind to your son; now you see I am as good as my word*. The Lord Chancellor, as to this evidence, observed, the rule upon this head was the same in law and in equity; and his opinion was, that it might be admitted. The statute indeed laid down a very strict but proper rule, relating to real estates, viz. that "no interest, any longer than for three years, should pass in them without writing, nor any trust in them for a longer time, unless the trust arose by operation of law." The same rule by that statute related to the devising of real estates; but, in all these cases, there was a difference both

(nn) [Ante, p. 117, note (k).—Ed.] p. 128 a. et vide 2 Burr. 978. [And

(o) *Bonham v. Newcomb*, supra, post, 427, 8.—Ed.]

(p) Barnard. 90. Infra, 1025.

Text over-ruled.

(W) This distinction does not accord with the cases in the preceding note. The authorities there cited sufficiently establish, that a bequest of a general residue to a charity, will be void as to such part of the residue as consists of mortgages or money secured on mortgage; and see Duke's Ch. Uses, 424. The principal point in the case of *Vaughan v. Farrer*, namely, that the word "erect" did not of necessity imply "to build," but only imported the foundation of a charitable institution metaphorically, appears also to have been over-ruled. Amb. 616. 751. 1 Bro. C. C. 441. 6 Ves. 404. 8 Ves. 186. 191. 9 Ves. 535.

in law and in equity, between absolute estates in fee and for a term of years, and conditional estates for securing the payment of a sum or sums of money. In the case of absolute estates, it could not be admitted, that parol evidence of the gift of deeds should convey the lands themselves; but, where a mortgage was made of an estate, that was only considered as a security for money due, the land there was the accident attending upon the money, and when the debt was discharged, the interest in the land followed of course. In law, the interest in the land was thereby defeated; in equity, a trust arose for the benefit of the mortgagor (x). In an ejectment, where a title was made under a mortgage, if evidence was given, that the debt was satisfied, this was considered as defeating the estate which the mortgagee had in the land; and in such cases, especially where the mortgage was ancient, the court would presume that the money was paid at the day, and would direct the jury to give their verdict accordingly, unless it clearly appeared that the money could not be paid at the day; no writing was in these cases necessary, which shewed, that even at law the debt was considered as the principal, and the land only the incident. Equity went farther, and in all cases said, that when the debt appeared to be satisfied, there arose a trust by operation of law for the benefit of the mortgagor. This case was within the exception in the Statute of Frauds, which had been mentioned, as to trusts arising by operation of law; and in these sort of cases the court received any kind of evidence of payment: therefore, if a mortgage was made by one partner to another, and the mortgagor agreed with the mortgagee, that he should take a certain part of the profits of the partnership in discharge of the mort-

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Debt the principal, land the incident, ante, 116 a.

(X) In confirmation of this doctrine, Lord Mansfield, in delivering the judgment of the court in the case of *Martin v. Mowlin*, 2 Burr. 969, said, a mortgage is a charge upon the land; and whatever will give the money, will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. It will pass by a will not made and executed with the solemnities required by the statute of Frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: Nay, it would do it though the debts were forgiven only by parol, for the right to the land would follow notwithstanding the statute of Frauds. *Infra*, 1027.

Debt may be forgiven by parol.

gage, that of itself would discharge it. Here was a mortgage made, and a bond at the same time entered into for performance of covenants. Suppose an obligee delivered up a bond with intent to discharge a debt, the debt would certainly be thereby discharged; and if the bond was discharged in the present case, the mortgage would be discharged with it; his Lordship directed an issue to try whether these expressions were used or not, the evidence as to this point being doubtful.

Absolute conveyance to mortgagee, who, after money paid, stated he held in trust for mortgagor's wife and children; this trust executed, though not in writing.

So where H. (q), in consideration of 80%. paid by the defendant S. conveyed a house, and surrendered a copyhold estate to him and his heirs; the bill was for a re-conveyance on payment of the remainder due of the 80%. and interest. The defendant, by answer, insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement that the plaintiff might redeem; but confessed it was in trust, that after the 80%. with interest was paid, the defendant *should stand seised for the benefit of the plaintiff's wife and children*, although no such trust was declared in writing. For the plaintiff it was insisted, that he, having replied to the defendant's answer, *who had not made any proof of such pretended trust*, was bound by his confession, *that he was not to have the estate absolutely to himself*, and that no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand, because the defendant had not proved it. *But the court decreed the trust for the benefit of the wife and children* (Y).

(q) *Hampton v. Spencer*, et è cont. 2 Vern. 288.

Trust confessed by answer, binding.

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(Y) The authority of this case has been questioned, but perhaps without foundation. The same point was so decided by Lord Hardwicke, in the case of *Cottingham v. Fletcher*, 2 Atk. 155. There the plaintiff, whilst a papist, assigned an advowson to the defendant for ninety-nine years, and having conformed to the protestant religion, brought his bill for a re-assignment of the term, suggesting he had only assigned it in trust for himself, and to avoid the penalties of the statute of 3 Jac. 1, and 1 W. & M. but not any trust appeared in writing. The defendant pleaded the statute of Frauds and Perjuries in bar to the discovery; but by his answer admitted, that the advowson was assigned to him for the purposes charged by the bill. Upon this his Lordship was of opinion that the plea ought to be over-ruled; the defendant having by his answer admitted and confessed the trust, and the plea was over-ruled accordingly; et vide S. P. infra, 151, 2.

But in the case of *Robinson v. Gee* (r), Lord Hardwicke was of opinion, parol evidence could not be admitted as to an agreement between *co-mortgagors*, to charge the lands otherwise than they would have been affected by the operation of law upon the contract. That case, as to the point in question, was thus: A., tenant in tail, remainder to his brother in tail, with other remainders, wanting to raise money to discharge debts on the estate, proposed to B. to join in a mortgage, which was agreed to and done; both joined in the bond, but A. being first named, received the money. The remainder being vested in possession in B., on the death of A., the creditors of A. brought a bill to turn the mortgage and interest on the estate of B., and to exonerate the personal estate of A. Parol evidence was offered of a particular agreement between the brothers, that this should rest entirely upon the estate of B.: this was objected to, as not being proper evidence within the statute of frauds, because on parol; whereas, this being a real right annexed to a real estate, such an agreement could not be proved without writing. Lord Hardwicke observed, as to this part of the case, that (s), as to the parol evidence, it was not necessary to give an absolute opinion, but he doubted whether it would be good. This was certainly a kind of real right, being to affect a real estate *in all events*, contrary to the writing, and to rebut the equity. Before the case of *Brown v. Selwin* (t), it was held in several cases, that parol evidence might be given to rebut an equity, although relating to a real right; but, in that which was the case of a will, the Lords held otherwise: from which determination, going farther than any had ever gone before, his Lordship did indeed differ in opinion; his Lordship said the equity *there* was (u), that two persons being made executors and *residuary legatees*, and one of them being indebted to the testator to the amount of 3000*l.* the latter insisted his debt was thereby extinguished; the former affirmed the contrary, and claimed a moiety of the 3000*l.* as one of the *residuary legatees*. The former offered parol proof of his being made an executor

Parol evidence not admitted between co-mortgagors to discharge assets of one deceased;

nor to shew that by naming executor, testator meant to cancel his debt.

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(r) 1 Ves. 251. [Et vide post, 149. Par. Ca. 179. 2 Eq. Ca. Abr. 464. —Ed.]

(s) 1 Ves. 253.

(u) Vide *Taylor v. Taylor*, 1 Atk. 386.

(t) Ca. temp. Talb. 240, S. C. 4 Bro,

by the testator, with intent to extinguish that debt, but the Lords would not suffer it to be read (*u u*); and his Lordship said this was a stronger case than that then under consideration; but, even supposing this evidence might be read, his Lordship thought it was not sufficient to prove that for which it was brought (*z*).

Four preceding cases distinguished.

We must here observe the evident distinction between the case of *Robinson v. Gee*, and those of *Richards v. Sims*, and

(*u u*) [4 Bro. Par. Ca. 180.—*Ed.*]

Rules in equity as to parol evidence.

(*Z*) Lord Hardwicke, in 2 Atk. 374, expressed himself to be of opinion, that in the case of *Brown v. Selwyn*, the parol evidence ought to have been received; and that Lord Talbot rejected it with no small degree of reluctance, though the House of Lords affirmed his decree, deeming the admission of the evidence to be of the most mischievous consequence. But his Lordship afterwards (in *Ulrich v. Litchfield*, 2 Atk. 373) laid down the rule of courts both of law and equity, in the admission of parol evidence in the case of wills to be only, first, to ascertain the person, where there are two of the same name, or where there has been a mistake in the christian or surname, and this, upon absolute necessity, to prevent the will from being rendered void, as in *Cherney's case*, 5 Co. 68. And, second, to rebut a presumption raised in favor of the next of kin, against the legal title of the executor, to the residue of his testator's effects; though for this latter purpose his Lordship afterwards, in *Blinkmore v. Feast*, 2 Ves. 28, expressed some doubt of the propriety of admitting such evidence. However, the above case of *Brown v. Selwyn* seems to have established the rule, that parol evidence will not be admitted to supply or contradict the words of a will, or to explain the intention of the testator where the words used are unambiguous and intelligible. So in *Stratten v. Pyne*, 3 Bro. P. C. 257. *Errington v. Broughton*, 7 Bro. P. C. 12. *Chamberlayne v. Chamberlayne*, 2 Freem. 52. *Cole v. Rawlinson*, 1 Salk. 234. *Maybank v. Brooks*, 1 Bro. Ch. Rep. 84. *Elliot v. Davenport*, 1 P. Wms. 83. But if it be doubtful out of what fund a legacy given by a testator is to arise, or if there be an ambiguity with respect to the subject to which the words of the will (though clear in themselves) are to be applied, it should seem parol evidence will be allowed to explain and remove the doubt. *Jeacock v. Falkner*, 1 Bro. C. C. 296. *Fonnereau v. Poyntz*, Ib. 474, as commented on in 6 Ves. 401. *Selwood v. Mildmay*, 3 Ves. 306, citing *Dobson v. Waterman*, Ib. 308, n. (a). So if the intention of the testator may be inferred and presumed from expressions used in the will, parol evidence may be adduced to prove or explain that intention. *Petit v. Smith*, 1 P. Wms. 9. Ib. 116. *Wingfield v. Atkinson*, 2 Vern. 673. Ib. 252. *Rutland v. Rutland*, 2 P. Wms. 212. *Walton v. Walton*, 14 Ves. 322; et vide 2 Ves. jun. 649. 471. *Langham v. Sanford*, 2 Meriv. 17. But if no expression appears on the face of the will, indicative of an intention in the testator to do a certain act, or forgive a certain debt, parol evidence will not be allowed to prove it. *Osborn v. Villiers*, 2 Bac. Abr. 426. 3 Wood.

Hampton v. Spencer; and also between these cases and that of *Brown v. Selwin*, referred to by Lord Hardwicke; which last, I apprehend, turned upon a different point, and was not governed by the Statute of Frauds; for, in the cases of *Richards v. Sims*, and *Hampton v. Spencer*, the question, as to admission of parol evidence, arose between the mortgagors and mortgagees, or their representatives; but, in the case of *Robinson v. Gee*, the question was between the creditors of a joint-mortgagor and his co-mortgagor, the latter of whom, in law, independant of any parol agreement, was considered only as a collateral security; but, if the parol agreement had been admitted in evidence, it would have charged the estate of the latter, which would not otherwise have been affected, if the deceased mortgagor had left assets. Consequently, the ground of admitting parol evidence in the former cases does not exist in the latter; for the court, in the former case, considered the essence of the contract as a negotiation for a loan, the land as pledged collaterally to secure the payment of it; that, therefore, any evidence which explained, impeached, or discharged the personal contract for a loan, affected the land, not directly, but *consequently* only; *ex. gra.* if the money borrowed was paid, or the debt discharged, the lien upon the land, which was only to secure that, determined; in equity, therefore, it was from thenceforth held in trust for the mortgagor. But in the case of *Robinson v. Gee*, the evidence offered went directly to affect the lands in the hands of the surviving mortgagor with a parol agreement, contrary to the Statute of Frauds, made in contemplation of the mortgage it is true, but totally irrelative to the contract for the loan between the mortgagor and mortgagee, to which, in the former case, the evidence

Lect. 495. Where parol evidence is let in to explain a will, the first evidence to be received, is that of declarations made at the time of executing it. The evidence of declarations, made either before or after, are entitled to little attention in comparison with this. 2 Meriv. 23. See further on parol evidence the next note, and *infra*, 382, 3. 729, 730. 1 Jno. Wils. 24. 4 Maule & Selw. 350. 2 Meriv. 343. 2 Ball & Bea. 35. *Burglary v. Ellington*, Brownl. 191. 2 Tho. Co. Litt. 9. (E). Roper on Leg. 433. 2 Madd. Ch. 105, 2d. edit. Sug. Ven. & Purch. 115, 5th edit. Rob. Frau. Dev. 1 Phil. on Evid. 566. *Doe v. Jersey*, 3 Barn. & Cress. 870, and particularly Peake Ev. ch. 2. s. 5. *passim*.

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continued.

No parol evidence to explain written instrument.

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offered was considered to apply directly, and by affecting that, to affect the land indirectly and consequentially: and, in the case of *Brown v. Selwin*, the object was to procure the admission of parol evidence to shew that the testator intended words in his will to operate otherwise than they would do, if taken according to their ordinary import (x), contrary to a settled rule of law; that where a will or instrument explains itself; no evidence out of it shall be admitted; but the intention shall be collected from the written words; for, even in the case of an ambiguity on the face of a deed or will, it is clear law, that it can never be helped by averment; because the law will not couple and mingle matter of specialty, which is of higher nature, with matter of averment, which is of inferior account; for that would be to make all deeds doubtful and subject to averments, and so, in effect, things to pass without deed, which the law appoints shall not pass but by deed. And, therefore, if a man give land in tail (though it be by will) the remainder in tail, and add a proviso to restrain alienation and create a perpetuity; it cannot be averred and proved, upon the ambiguity of the reference in this clause, that the intent of the deviser was, that the restraint should go only to him in remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large; it being a fixed maxim, that all ambiguity of words arising from matter within a deed or instrument may be holpen by *construction*, or in some cases by *election*, but never by *averment*.

Parol evidence admitted to explain ambiguity dehors will (A).

Indeed, there are cases in which parol evidence is admitted to shew the intention of a testator or deviser; but those cases

(x) 2 Mod. 11. Ib. 159. *Cheyney's case*, 5 Co. 67. 2 Vern. 337. Ib. 625. [Et vide post, 150, 1. 729.—Ed.]

Latent and patent ambiguities distinguished as to parol evidence.

(A) Parol evidence is admissible upon a latent but not upon a patent ambiguity, to rebut an equity grounded on presumption (and perhaps to support the presumption), to oust an implication, and to explain what is parcel of the premises granted or conveyed; per Lord Eldon, C. in *Druce v. Denison*, 6 Ves. 397. A latent ambiguity arises where the deed or instrument is sufficiently certain and free from ambiguity; but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument. A patent ambiguity is such as appears on the face of the instrument itself. If a person grants his manor of S. to one and his heirs, so far there

are not where the ambiguity appears upon the deed or instrument, but where there is some collateral matter out of the deed which gives rise to it. As, where a man bequeaths a legacy, or devises an estate to J. S., the son of N.; and N. has two sons of that name; it is clear, upon the face of the will, that the donor meant a benefit to J. S., the son of N.; yet an ambiguity arises out of the deed, from N.'s having two sons of that name, that renders it doubtful which of them was intended to be benefited; to remove which doubt, parol evidence may be admitted. So, where a man gave his wife (y) a legacy of 1000*l.*, and, as to the residue of his real estate, (except one close, in his will bequeathed to a charity) devised it to her and her heirs, in trust to sell the same, or so much thereof as should be needful for payment of his debts and legacies; and also gave all his personal estate to her towards payment of his debts and legacies, and made her executrix; the question was, whether here was an implied or resulting trust in the executrix, as to the residue after his *debts* and *legacies* paid, for the benefit of the heir; and parol evidence was admitted to shew that it was the testator's intention, that this should be a beneficial devise to the wife and executrix.

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(y) *Docksey v. Docksey*, Widow and Lady Granville, et al.' 1 Bro. Par. Executrix, 1 Bro. Par. Ca. 324. Ca. 305. S. C. P. Wms. 114. S. C. 2 Eq. Ca. Abr. 415. Ca. 4. 430, c. 8. 2 Vern. 648. 507, c. 1. *Duchess of Beaufort v.*

appears to be no ambiguity; but if it should be proved that the grantor has the manors both of South S. and North S., this is a latent ambiguity, and parol evidence may be admitted to shew which of the two manors the party intended to convey. On the other hand, if a clause in a deed or will, or any other instrument, is so ambiguously or defectively expressed that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party, evidence of the declaration of the party cannot be admitted to explain his intention, but the clause will be void on account of its uncertainty. In many cases an apparent uncertainty may be removed by collecting the general intention from other passages in the writing, so as to make the whole consistent, or by a reference to some event or some other writing, or some medium of explanation adverted to in the instrument. But when after comparing the several parts of a written instrument, and collecting all the lights which the writing itself supplies, the intention of the parties still appears to be uncertain, parol evidence of their intention is not admissible. See Bac. Elem. Rule 23, and books referred to in last note.

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continued.

Ambiguity must arise from circumstances, and not on face of will.

It is observable in this, as in the preceding case, that the ambiguity arises from a circumstance out of the will, and not upon the face of it, *viz.* the wife's being capable of taking the bequest given by the testator in two capacities, as legatee to her own use, and as executrix in trust for the next of kin; and it being doubtful which way she was intended to take by the testator, because it was, *prima facie*, reasonable to presume he would not have given her part as a legatee, if he had meant to give her the whole residue beneficially as executrix, for the latter bequest would have involved in it the former; therefore, as there was no doubt but that she took the whole by the will, the only question was, in what capacity she took it? And it is like a bequest of 50*l.* to J. S., and 100*l.* to J. S., sons of A. B.; in which case, there can be no doubt but parol evidence would be admitted to prove which son was meant to have the greater, and which the lesser legacy; the only difference being, that, in the latter case, the bequest would be to two persons in their natural capacities; whereas, in the former, it is to one person capable of taking in two distinct capacities, the one natural, the other artificial.

Brown v. Selwin distinguished from preceding cases.

But in the case of *Brown v. Selwin* there was a plain and express devise of a moiety of every part of the testator's personal estate, not before disposed of, to the co-executor, of which the debt to the testator was indisputably part. Therefore no doubt arose, as to the bequest, by matter out of the will; but the intent was to destroy the force of the written will, and overturn the plain words of it by parol evidence only; and not to obviate or take off an implication, which might or might not take place, and yet the words of the will have their force and operation; nor was it to answer any rule or construction of equity arising upon, or consistent with the words of the will, but to control and take away a plain devise and express gift to the co-executor.

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Proviso for redemption supplied by parol.

Nor do I apprehend that either of these cases (x) clashes with the resolutions that have been made, as to admitting parol

(x) 2 Vern. 506. 2 Freem. 284. 2 Wil. 620. 2 Eq. Ca. Abr. 482. 1 Ves. 251.

evidence on agreements respecting lands; those cases depending upon another principle, *viz.* that of the jurisdiction of equity where there is fraud. As where an agreement for a mortgage was drawn by the mortgagee, the mortgagor being able to write his mark only, and the mortgagee omitted to insert a covenant for redemption; in which case (a), on a bill of foreclosure, the court permitted the mortgagor to read evidence to shew the omission.

So (b), where a mortgage was drawn into two deeds, one an absolute conveyance, the other a defeasance, and the mortgagee omitted to execute the defeasance, the mortgagor was permitted to shew the mistake (B).

Intention to execute defeasance shewed by parol.

Again (c), where an absolute conveyance was made for a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demanded interest for his money and had it paid him; this was admitted as evidence to explain the nature of the conveyance. For, in such cases, the proof offered is not considered as a variation of the agreement but explanatory only of what it was meant to have been: and the allowing any other construction upon the Statute of Frauds and Perjuries, would be to make it a guard and protection to fraud, instead of a security against it, as was the intention of it.

Demand of interest after absolute conveyance makes it a mortgage.

(a) *Joynes v. Statham*, 3 Atk. 389. note (M). And see 1 Vern. 108. Pre. Cha. 104. [Et vide Butl. Co. 2 Freem. 180.—Ed.]
Litt. 222 b. n. 2.—Ed.]

(c) Ibid. [Et vide ante, 125 a, 126,

(b) 3 Atk. 389. *Maxwell v. Montague*, Pre. Cha. 526. [Ante, 120,

note (P).—Ed.]

(B) So parol evidence will be admitted to explain that a deposit of deeds was by way of mortgage; but it will always be preferable to have a memorandum in writing, shewing the contract between the parties, rather than suffering the transaction to depend on loose averments. The subject of equitable mortgages will be more fully treated of in a subsequent page, 1049. Parol evidence will also be admitted to shew that a mortgage is subsisting, although the mortgagee may have been in possession upwards of twenty years. See post, 382, 3.

Equitable mortgage.

Secret trusts not on face of deed, but admitted by trustees, may be proved by parol.

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Another exception (*d*) likewise deserves our attention in speaking of this statute, and that is, in cases of secret trusts of estates that do not appear upon the face of the deeds whereby they are conveyed, but are *admitted* by the trustee; for such cases, being out of the mischief, are considered, in equity, as not having been in contemplation of the legislature on passing that statute.

Thus, where one had made a mortgage in fee to A. (*e*), and it was expressed to be in consideration of 700*l.* paid by A. and C. pretended the money was advanced by D. his wife's first husband, and belonged to her as his executrix. On a bill of interpleader, filed to determine to whom the money should be paid, the question was, whether C. should be admitted to read the examination of his witnesses, to prove his wife's interest in the mortgage-money, upon the ground that this was a trust which arose by implication of law, and was excepted out of the statute? But it was contended, on the other side, that this imported to be a mortgage for money paid by A. and that though a trust, which resulted by implication of law, was out of the statute, yet that trust must arise upon the face of the deed itself, and that if inquiry was made, upon parol proof, whose money it was, this was in the teeth of the statute; and the case of *Kirk v. Webb* was cited, wherein it was decreed, that an estate cannot be made a trust, by proving the money laid out upon it, to be such an one's or such an one's. *Sed per* Justice Powell, I will not hinder you from reading, for though, at law, it is not to be allowed, where a jury may be inveigled by that which is not proper evidence, yet here is no such danger. And the proofs were read, but the Justice would not decree the trust.

Mortgagor need not join in transfer of mortgage (c);

There is no necessity for the mortgagor, or his representatives, to concur with the mortgagee in the assignment of his security to a new mortgagee. An equally valid transfer of the

(*d*) *Hampton v. Spencer*, *supra*, [145, and note (Y).—Ed.]

(*e*) *Newton v. Preston*, Pre. Cha. 103.

Desirable that mortgagor should join in transfer.

(C) In the transfer of a mortgage the debt is the principal object; for, per Lord Loughborough, in the case of *Matthews v. Walwyn*, 4 Vcs. 128, "The

debt and security, may be made by the mortgagee alone, by his assigning in the same deed the mortgage debt, and the be-

real transaction is an assignment of a debt from A. to B.; but that debt is collaterally secured upon a real estate. The debt therefore is the principal thing." It is not in any case absolutely necessary in the simple transfer of a mortgage that the mortgagor should be made a party (9 Ves. 269), it will, however, be always desirable to obtain his concurrence when it can be done, as furnishing an admission on his part that the sum still remains unpaid; for, as an assignee is entitled only to the sum actually remaining due upon the mortgage, and not to what may appear to be due upon the face of the deed, he will otherwise be liable to be defrauded by the mortgagee by paying a greater sum than remains due. To use the words of Lord Loughborough in the above cited case, "It was supposed that in practice there is no occasion to make the mortgagor a party, and in some cases it may not be possible to make him a party to the assignment, and to hold that the assignee of a mortgage is bound to settle the accounts of the person, from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is, that persons most conversant in conveyancing hold it extremely unfit and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due." And again in the same page, "No conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due."—A variety of forms of transfers or assignments of mortgage will be added in the Third Volume.

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Where the mortgagor is a party, he is sometimes required to enter into a fresh covenant for payment of the money to the assignee; but as he has already covenanted in the mortgage deed to pay the money to the mortgagee, his executors, administrators, and assigns, and as by his being a party to the deed he expressly acknowledges the assignee to be the assignee of the mortgage, this covenant may be dispensed with. Where, however, the mortgagor is dead, and his heir consents to join in the transfer, such a covenant would be an additional security to the assignee, and may therefore, with great propriety, be inserted. But, it is to be observed, that this covenant by the heir will not make his personal estate first liable, it being considered only as an additional and collateral security. See *Bagot v. Oughton*, 1 P. Wms. 347. *Evelyn v. Evelyn*, 2 Ibid. 659. Ante, 92 a, note (L). *Shafto v. Shafto*, cited 1 P. Wms. 664.

When new covenant for payment of money necessary.

If neither the mortgagor nor his heir join in the transfer, notice of the mortgage should be given to them by the assignee, as otherwise payment by the mortgagor or his heirs to the mortgagee, whether of principal or interest, will be good, notwithstanding the assignment. *Matthews v. Walwyn*, 4 Ves. 118. And although the premises be situated in a register county, and the assignment be duly registered, yet actual notice of the transfer should be given to the mortgagor; for registration will not be a sufficient notice. *Williams v. Sorrell*, 4 Ves. 389. Such notice, however, will not be necessary to the validity of the assignment. *Jones v. Gibbons*, 9 Ves. 411.

Notice of transfer to mortgagor.

benefit of all covenants and remedies for securing and recovering the same, and then assigning or transferring the mortgaged lands to the new mortgagee, subject to such equity of redemption, upon non-payment of the mortgage money and interest by the mortgagor, his heirs, executors, administrators, or assigns, as the estate was liable to, under and by virtue of the proviso for redemption in the original mortgage; and this is the usual practice where the mortgagor or his representatives are out of the way, or incapable of concurring.

unless mortgagee be in possession; and then to exonerate him from accounting for subsequent rents.

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Mortgagor not joining, arrears cannot be principal.

But if the mortgagee be in possession, the consent of the mortgagor is requisite to secure the mortgagee against accounting for the rents, subsequent to the assignment; but if the mortgagee is not in possession, the only difference to him, between an assignment, with the concurrence of the mortgagor or his representative, and one without, will be his being a party to any future bill for redemption in the latter, and not in the former, case, which seems of little moment, where he has no rents or profits to account for; and the assignment is for the whole principal money then remaining due; and the difference to the assignee seems to be, that any arrear of interest paid by him, on the transfer of the security, without the concurrence of the mortgagor, will not be considered as principal money, carrying interest (D); but he will only be entitled to it as mere

Of turning arrears of interest into principal.

(D) Although it be a rule with respect to mortgages that arrears of interest shall not be considered as principal at the pleasure of the mortgagee, yet if the mortgagor be a party to the transfer, such arrears will become principal, as being in the nature of a further sum advanced by the assignee on behalf of the mortgagor, and the same was formerly considered to have been the case, although he were not a party, if the arrears due were actually and *bonâ fide* paid by the assignee. See *Smith v. Pemberton*, 1 Ch. Ca. 67. *Anon.* 2 Ib. 258. *Macclesfield v. Fitton*, 1 Vern. 168. (contra *semb. Askenhurst v. James*, 3 Atk. 271.) *Gladman v. Henchman*, 2 Ibid. 135. But by Lord Loughborough in *Matthews v. Walwyn*, 4 Ves. 118. 128. it is now perfectly settled, that as between the mortgagee and persons claiming under him, without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal.

Second mortgagee should join in transfer of first mortgage, when.

And it seems necessary in a case of this kind, when there is a second mortgage, and the first mortgagee is about to transfer his security to a third person, that the second mortgagee should join in the transfer of the first mortgage; for if there be any interest in arrear on the first charge, that cannot

interest, not carrying any interest at all, and will, therefore, lose interest upon so much as he shall so advance in discharge of any arrear of interest at the time of the transfer, and that the account, as taken between him and the old mortgagee, as to the money *remaining due* on the mortgage, at the time of the assignment, will not be conclusive on the mortgagor or his representatives, but it will be a matter to be proved in a bill for redemption (*f*).

Mortgagor not concluded by account between mortgagee and assignee (E).

(*f*) Vide Eq. Ca. Abr. 328, c. 8. et *Matthews v. Walwyn*, *infra* [904. 2 Eq. Ca. Abr. 594, c. 3. 3 Atk. 271. 953, 4, 5.—Ed.]

be converted into principal as against the second mortgagee without his concurrence. *Digby v. Craggs*, 2 Eden Rep. 200.

It is further observable, that although there may not be any thing unfair, nor perhaps illegal, in taking a covenant originally, that if interest be not paid at the end of the year, it shall be converted into principal, yet courts of Equity will not permit it, 1st. because a mortgagee cannot originally stipulate for a collateral advantage; and 2d. because it has a tendency to usury, although it be not usury in itself. *Chambers v. Goldwin*, 9 Ves. 271.

Agreement in mortgage deed to make arrears principal at end of year, bad.

(E) Confirmed by the present Chancellor in the case of *Chambers v. Goldwin*, 9 Ves. 264. it being there held, that an assignment of a mortgage, without the intervention of the mortgagor, will be subject to the account between the mortgagor and mortgagee. So in *Carew v. Johnstone*, 2 Sch. & Lef. 296, it was held, that a statement in an assignment of a mortgage that so much is due for principal and so much for interest, will conclude a mortgagee, though not the mortgagor, unless he be a party to the assignment. In another report of the case of *Goldwin v. Chambers*, 1 Smith, 252, it was stated that in general the assignee must take upon his own risk the correctness of the sum computed to be due from the mortgagor to the mortgagee; but that if the mortgagor make no objection to the demands for a length of time, and deals with the assignee of the mortgagee without objecting to the account of the original mortgagee, he cannot have a decree to surcharge and falsify against the assignee, but must resort for redress to the original mortgagee. And it was there also stated that accounts settled and signed cannot be falsified except for error; but if error be manifest the court will correct it, notwithstanding any stipulation between the parties. The error, however, must be beneficially charged in the bill, and proved, otherwise the court will not open the account. In *Langstaffe v. Fenwick*, 10 Ves. 495, cited *infra*, 297, the court opened the account, because the mortgagee had taken a poundage as receiver.

Mortgagor, how affected by account between mortgagee and assignee.

CHAP. VII.

OF THE INTEREST OF A MORTGAGOR IN THE PREMISES
MORTGAGED BY HIM.

*Of mortgagor's
interest till de-
fault.*

AS soon as the estate of the mortgagee is created, which is now done either by lease and release, bargain and sale, or frequently by creation of a term for years in the premises, he may immediately enter upon the lands, but subject to be dispossessed upon performance of the condition, by payment of the mortgage money, at the day limited (a). The usual way, therefore, as hath been said, is to agree that the mortgagor shall hold the land till the day assigned for payment, and that the mortgagee shall not intermeddle with the possession until default therein. And, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession without any possibility, at law, of being afterwards evicted by the mortgagor.

Same.

Some doubts have arisen, what estate the mortgagor has in the land from the time of making the mortgage, under such an agreement that the mortgagee shall not intermeddle with the possession until default of payment; whether he be lessee for so many years, or only in as tenant at will, or by sufferance. And, in the case of *Powseley v. Blackman* (b), where a mortgage was made by bargain and sale, with a proviso and agreement between the parties that the mortgagee, his heirs or assigns, should not intermeddle with the actual possession of the premises, or perception of the rents thereof, until default of payment, which was to be made at the distance of some years. It was held by the court, that he was tenant at will; a distinction being taken between this agreement and an agreement with the mortgagee, that he should enjoy it during those years (c); for the latter would have amounted to a lease for years.

(a) 2 Bla. Com. 158.

(b) 2 Cro. 659. [S. C. Bridgm. Rep. 12.—Ed.]

(c) 5 Hen. 7. 1. 21 Hen. 7. 36.

But although, *prima facie*, there is a resemblance between the estate of a mortgagor left in possession of the premises under such an agreement, or otherwise, and a tenancy at will; yet, upon a minute and accurate inspection, a clear distinction will be found between these interests; and also between the case of a mortgagor in actual possession, and one who under-lets to tenants; for, by the agreement understood between the mortgagors and mortgagees, the latter stipulate to receive interest, the former to keep possession; but no rent is reserved from the mortgagor, nor is he entitled to notice to quit; he hath not even a right to the emblements, each of which are properties appertaining to a tenancy at will in the strict sense of the word; and the reason is, because, in this case, the *crop* as well as the land, is a security for the debt. But, in both cases, even the similitude ceases, if there be an under-tenant; for there can be no such thing as an under-tenant to a tenant at will; such demise being, in itself, a desertion, which, in law, amounts to a determination of the will (A).

Mortgagor and tenant at will distinguished;

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former not entitled to emblements. Et vide 161, infra, Doug. 283;

nor can he under-let.

(A) Many respectable opinions affirm, that at this day there cannot be such an estate as a tenancy at will. It seems certain that such an estate cannot arise without an express grant or contract. But all that the decided cases have determined is, that what was formerly considered to be a tenancy at will, is now a tenancy from year to year. Vide *Watk. Elem. of Conv. p. 6. Clayton v. Blakey*, 8 T. R. 3.

If tenancy at will now exists.

A mortgagor, though accounted for many purposes a tenant at will, is so by implication only, and in a secondary sense, for the mortgagor may assign or convey his estate subject to the mortgage; but an actual tenant at will has not any assignable interest. It has been said, that there is an implied agreement between the mortgagor and the mortgagee, that the mortgagor shall hold as tenant at will to the mortgagee, paying the interest from time to time, and principal when called for. If the mortgagor be tenant at will he will be entitled to the rents and profits till that will be determined; and whenever the will may be determined, it cannot have relation back to a former time, because that would be by a subsequent act to make an estate tortious, which was rightful at the time it existed. That a mortgagor has frequently been called a tenant at will to the mortgagee both in courts of law, and in courts of equity, is undoubtedly true; but it is an inaccurate expression, and it was used when it was not material to settle what his powers or interests were, nor to ascertain with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In the old cases he is called a tenant at will, a tenant by sufferance, a receiver, an agent, and in one case, a servant to the mortgagee, 1 H. Bl. 117. In *Keech v. Hall*, Doug. 22. the counsel for the defendant called him the agent of the mortgagee; and Lord

Mortgagor is quasi tenant at will.

*Mortgagor dis-
seisor at elec-
tion.*

In such case, it seems, the mortgagee may consider the mort-

Mansfield stated him to be tenant at will to some purposes, but not to others; and in a subsequent case (*Moss v. Gallimore*, Doug. 282. Post, 174, 5,) his Lordship said, a mortgagor was not in reality a tenant at will to the mortgagee; for he did not pay him rent, he was so only *quodam modo*. Nothing was more apt to confound than a *simile*. When the court or counsel called a mortgagor a tenant at will, it was barely a comparison. He was *like* a tenant at will. The mortgagor received the rent by a tacit agreement with the mortgagee; but the mortgagee might put an end to this agreement when he pleased. See the learned author's quære on this passage in his note (d), p. 174, post, and the Editor's notes there. That a mortgagor is not a receiver was clearly explained by the Lord Chancellor in *Wilson Ex parte*, 2 Ves. & Bea. 253. His Lordship's words are, "a mortgagee never can in this court make the mortgagor account for the rents for the time past: there is not an instance, that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee."

*Mortgagor is
neither tenant
at will nor by
sufferance, nor
receiver, nor
agent, but mort-
gagor, a cha-
racter distinct
from all, having
a unity of pos-
session and title
with mortgagee.*

Mr. Justice Buller's observations on this subject are very sensible and ingenious, and ought not to be omitted in the explanation of a subject on which there appears to have been so much contrariety of opinion and perplexity of expression. Whenever, he observes, it is necessary to decide the question between the mortgagor and mortgagee, it seems quite sufficient to call them so, without having recourse to any other description of men, or to what they are most like. But if a likeness must be found, a mortgagor is as much, if not more like, a receiver than a tenant at will. In truth he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, namely, in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid a day antecedent to the determination of the will (vide *Goodtitle v. Herbert*, 4 T. R. 680.) But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will, sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account. He is not a receiver; for, if he were, he would be obliged to pay all the rents and profits to the mortgagee, which is not the case. Two things which differ from each other in any respect cannot be the same; therefore he is neither a tenant at will nor a receiver. Nor is it necessary that he should be so; for a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests, as well settled as any in the law. The possession of the mortgagor is the possession of the mortgagee, and as to the inheritance they have but one title between them. *Birch v. Wright*, 1 T. R. 383.

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*Present view of
mortgagor's in-
terest till de-
fault.*

Hence therefore it appears to be altogether unnecessary to hunt through a vocabulary of technical terms, to affix on the mortgagor a more appropriate name than the one he at present bears, being in itself a denomination indicative of his character, and well understood. Upon the execution of the con-

by which the mortgage is created, the legal freehold and inheritance, or the legal estate for the term of years created by the mortgage, becomes immediately vested in the mortgagee, subject to the condition or proviso for redemption. 3 Eden, 280. But the actual occupation and possession of the lands is now never (except in the case of Welch mortgages) given to the mortgagee. On the contrary, a clause is usually inserted at the end of the mortgage deed, that until default is made in payment of the mortgage money, or of the interest, the mortgagor shall retain the possession and receive the rents. This clause is merely the expression of what formerly was tacitly implied. But there is another tacit understanding between the mortgagor and mortgagee, namely, that although the mortgagor is permitted to collect the rents in the nature of a receiver, yet so long as he pays the interest he is not to be accountable for the rents to the mortgagee. It is true the mortgagee may put an end to this arrangement and receive the rents himself, if the interest be not regularly paid, but not otherwise (it is presumed); for the mortgage is given to secure the payment of interest, and not to insure the receipt of rents; and in no case will a court of Equity make the mortgagor account to the mortgagee for rents which he has received in time past. *Wilson Ex parte*, 2 Ves. & Bea. 253.

The old doctrine of the courts placed the mortgagor in a very disadvantageous light. It considered him, after forfeiture of the condition, as having but a mere right to reduce the estate back to his own possession by payment of the money. But it is now established, that the mortgagor has an actual estate in equity, both the equitable freehold (1 Atk. 603) and the equitable inheritance (13 Ves. 334); which latter may be devised, granted, and entailed (*infra*, 251, 2, 3): that the entails of it may be barred by fine and recovery, and that there may be a *possessio fratris*, and a tenancy by the curtesy, but no tenancy in dower of such an estate. 1 Atk. 603. In short, "the person entitled to the equity of redemption is in equity considered as the owner of the estate; it descends to his heir; may be the subject of settlement or will, may be limited in the same manner, and those limitations barred in the same manner, as those of the legal estate; the mortgagee being but a mere incumbrancer;" per Lord Manners, 2 Ball & Bea. 402. At law, however, the mortgagor holds the possession of the land and receives the rents by the permission of the mortgagee, in whom the legal estate of freehold is vested to prevent an abeyance, and who may by ejectment, without giving any notice, recover the actual possession and obtain the receipt of the rents and profits. Butl. Co. Litt. 205 a. n. 1. s. 3. *Infra*, 160, 175, *in notis*; and see the observations of Lords Mansfield and Kenyon, in note (P), *post*, 166; and the conclusion in note (I), *infra*, 1035.

Mortgagor's interest at law and equity.

Since the last edition, this subject has undergone considerable discussion and refinement, both in the courts of law and equity, as also in the chambers of the conveyancer.

Late views of this subject at law and equity.

Sir Thomas Plumer, M. R. in the late case of *Cholmondeley v. Clinton*, 3 Jac. & Walk. 183, adopting Mr. J. Buller's observations, remarked, that the relation between mortgagor and mortgagee was perfectly anomalous and *sui generis*. It was a contract of a peculiar nature, by which, under certain conditions, the mortgagee became the purchaser of a security and pledge, to hold for his own use and benefit. He acquired a distinct and independent

In equity.

beneficial interest in the estate; he had always a qualified and limited right, and might eventually acquire an absolute and permanent one to take possession, and he was entitled to enforce his right by an adverse suit *in invitum* against the mortgagor; all which could never take place between trustee and *cestui que trust*. They had always an identity and unity of interest, and were never opposed in contest to each other. 2 Jac. & Walk. 183. So in *Christopher v. Sparke*, ib. 234, his Honour further remarked, that the argument of there being a tenancy at will, arose from a mere fiction; for there was no actual tenancy, no demise, either express or implied. The mortgagor had not even the rights of a tenant at will; he might be turned out of possession without notice, and was not entitled to emblements. It was only *quodam modo* a tenancy at will, as Lord Mansfield said in one of the cases (*Moss v. Gallimore*, 1 Doug. 269. 279); the relation of mortgagor and mortgagee was peculiar; in a court of equity the former was considered as the owner; and that was the nature of the contract between them; the tacit agreement was, that he was to be owner if he paid the money.

At law.

At law it was in a late case said, that a mortgagor in actual possession of the estate may properly be described as the *mortgagee's tenant*. He is in possession of premises whereof the legal title and interest is in another, and in possession by the permission and sufferance of that other. He is therefore in a court of law, within the strict definition of a tenant at will, and if he be described in a declaration as tenant to the plaintiff, proof of a mortgage deed between them will fully satisfy that description. *Partridge v. Bere*, 1 Dow. & Ry. 273. In this case Mr. J. Bayley observed, that a court of law knew nothing about mortgagor and mortgagee. It looked at the legal tenant, and it was admitted the mortgagor had the actual possession. The mortgagee had the legal estate, and in a court of law the tenancy of the mortgagor and mortgagee could not be disputed. Ib. 274. S. C. 5 Barn. & Ald. 604. In *Hall v. Surtees*, ib. 687, similar doctrine was propounded.

The six distinctions of Messrs. Morley and Coote.

The following remarks of Messrs. Morley and Coote tend so satisfactorily to elucidate the different characters in which a mortgagor in possession may be considered, that the extension of this note by their introduction here can require no apology. First, where the mortgagor is himself the occupant, and there is an express agreement that he shall continue in possession till default in payment of the mortgage money at a particular period; he may in the mean time either be considered as a tenant to the mortgagee, holding a legal interest of the nature of a term of years during such period; or, if the agreement cannot be considered as operating as a grant for the time, he may be regarded as tenant at will to the mortgagee under it. To the former construction it may be objected, that if the mortgagor be considered as holding a term, such estate would, on his death, vest in his personal representatives, to the exclusion of the heir, till default in payment; and if the heir previously entered, he might be ejected by them: but to this it may be answered that the heir entering would at law be tenant at will to the personal representatives; and as they would in equity be considered as trustees for him, a court of equity would interfere to prevent their ejecting him. We therefore incline to the opinion that notwithstanding the objection, the first construction is the most consistent with legal principles. Against the construction of a tenancy at will, there is the agreement on the part of the mortgagee for quiet enjoyment by

the mortgagor till default in payment, which is inconsistent with an estate at will between them. And we do not see upon what principles such an agreement can be held to estop the mortgagee from his ejectment, except, upon the ground of its conferring a legal interest on the mortgagor, which must in its nature be a chattel interest. Secondly, If, where there is an agreement for possession by the mortgagor till after default in payment, the money is not paid, and the mortgagor, being the occupant, continues in possession after the time fixed for payment, without any new agreement between him and the mortgagee, he appears, until payment of interest, [*Quære*, how can payment of interest affect the case?] to become a tenant at sufferance to the mortgagee. Thirdly, If there be no express agreement originally, as to the period of possession, and the mortgagor, being the occupant, remain in possession with the consent of the mortgagee, it should seem that in such case he ought to be considered strictly as tenant at will. Fourthly, In the latter case, the transfer of the mortgage by the mortgagee, without the concurrence of the mortgagor, would be a determination of the will, and the mortgagor would become tenant at sufferance to the assignee, until payment of interest. And wherever the mortgagor is to be considered as tenant at will, the death either of the mortgagor or mortgagee determines the estate. In the case of the death of the latter, it is apprehended the mortgagor becomes tenant at sufferance to the representative of the mortgagee, until payment of interest; but in case of the death of the mortgagor, if his heir or devisee enters, and holds, without any recognition of the mortgagee's title, by payment of interest or any other act, an adverse possession takes place; nevertheless his fine will not bar the mortgagee. Fifthly, In all cases where a tenancy at sufferance would exist between a mortgagee and mortgagor, and also where even an adverse possession would commence, as by the entry of the heir or devisee of the mortgagor, without the consent of the mortgagee, it is apprehended the payment of interest would be a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor or person deriving title from him should hold at will, and a strict tenancy at will would then commence. Sixthly, Where the estate is in the occupation of tenants, and the mortgagor is left merely in the receipt of the rents, it is apprehended no actual tenancy arises between him and the mortgagee; but he is to be considered merely as a receiver, without liability to account, [which is the very essence of a receiver; but it is clear the mortgagor does not receive the rents for the mortgagee. *Wilson Ex parte*, 2 Ves. & Bea. 253.] *Morley & Co. Watk. Elem.* 13, 14, 15.

For their fifth position, the learned gentlemen cite the following authorities, "*Holland v. Hatton*, Carth. 414, and 10 Vin. Abr. 418, pl. 19." The case referred to certainly seems to proceed on the notion that payment of interest preserved a tenancy between the mortgagor and mortgagee, and so prevented the operation of a fine which the former had levied; but it is quite clear, that without any regard to payment of interest, the mortgagee would not have been barred. 5 Barn. & Ald. 687. The mortgagee has nothing to do with rent till in possession, and his estate in the land is never affected with reference to the payment of interest, except as his neglect to demand interest for twenty years may be evidence of a dereliction of the pledge. But then it is evidence merely, and not an incident to his estate, and may be rebutted by shewing that the mortgagor treated the estate as in mortgage within the period mentioned.

gagor as a disseisor (B), and his lessee as a wrong-doer or not, at his election (d).

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Mortgagor in
nature of re-
ceiver (dd).

If the mortgagee permits the lessee to enjoy his lease, the mortgagor may, from thenceforth, be considered as a receiver of the rent, or, in some sort, a trustee for the mortgagee, who may, at any time, countermand the implied authority, by giving

(d) 2 Cro. 660. 3 Ib. 303, 304, 305.

(dd) [He was called the *servant* of the mortgagee in 1 H. Bl. 117.—Ed.]

Mortgagor not
a disseisor at
election, but his
tenant a tres-
passer.

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(B) To consider a mortgagor a disseisor in any light there should at least be some marks of resemblance between him and that species of tenant, in the same manner as when a mortgagor is compared to a tenant at will, there are certain features of fragility of tenure common to both tenancies. But it is difficult to discover any similarity of character between a disseisor and a mortgagor; and it seems equally difficult to contend that a mortgagor, after condition broken, holds by a tortious title, when, if he regularly pays interest, he retains the possession in virtue of an express agreement between him and the mortgagee. In the character of either agent, receiver, tenant at will, or even tenant by sufferance, he is totally unlike a disseisor, and he is still more unlike that tenant in the character of mortgagor. In page 49, ante, Lord Coke is stated to have said, that "if a man do mortgage his land, and yet still continues in possession, *no disseisin is wrought by this*;" because probably of the tacit agreement, which was formerly understood to exist between the mortgagor and mortgagee, that the mortgagor should hold as tenant to the mortgagee, paying the interest from time to time, and the principal when demanded. So in the case of *Smart v. Williams*, Comb. 249. *Infra*, 163, 4, Lord Holt, C. J. observed, when the mortgagor continues in possession, and the mortgagee assigns, the tenancy at will is determined, but he remains tenant at sufferance, *he is no disseisor; for there was no tortious entry*. The case quoted in support of the text is *Powseley v. Blackman*; but it was there expressly held, that if the mortgagor make a lease for years, he will not be any disseisor of the mortgagee, or as the case there was of the bargalnee, because no wrongful intention; if the lessee enter, he will be the only disseisor; but when the lease expires, the mortgagor will be tenant at will again. *Bridgm. Rep.* 12. *Gilb. Uses*, 238. The reason of this is, that every person who enters wrongfully will necessarily be a trespasser, and the freeholder may, at his election, treat the trespasser as a disseisor. *Blunden v. Baugh*, 'Cro. Car. 302. The mortgagor being in the nature of a tenant at will, has no power to create an estate for years, consequently his lessee will, in taking possession of the premises, enter under a wrongful or tortious title, and the mortgagee who has the legal estate of freehold may correctly consider him, but not the mortgagor, a wrong-doer and disseisor at election; and such, it is conceived, is the distinction borne out by the cases. See *infra*, 174.

This reasoning

notice to the tenant not to pay the rent to the mortgagor any longer (e).

But, if the mortgagor elects the other alternative, the lessee may be turned out by an ejectment, he being in under a person who had no power to under-let, but subject to eviction by the mortgagee. And so it was held by the Court of King's Bench, in the case of *Keech*, lessee of *Warne v. Hall* and another (f);

Lessee of mortgagor may be evicted by ejectment of mortgagee (c), without notice of mortgage, or notice to quit (c 2);

(e) *Hopkins v. Hopkins*, 1 Atk. 606.

(f) *Doug. Rep.* 21.

This reasoning is, it is conceived, in a great measure confirmed by the judgment of the Master of the Rolls, in the late case of *Cholmondeley v. Clinton*, 2 Meriv. 360, where his Honour pointedly remarked, "*But a mortgagor never can disseise his mortgagee. Why? Because his possession is not properly his own, but that of the mortgagee.*" The reason why a mortgagor is called a tenant at will to the mortgagee is, because his tenure is of that precarious and permissive nature, that whenever the mortgagee pleases, he may assume the possession, and equity will not interfere to prevent him; and the only point of similitude discoverable between a mortgagor and disseisor may perhaps be, that the mortgagee may assume this possession peremptorily by ejectment, without giving the mortgagor any notice to quit; and it may be said, that because an ejectment proceeds on an ouster or dispossession, it pre-supposes a disseisin by the mortgagor. This, however, is in fact a mere formality, adopted for the sake of avoiding the circuitous proceedings on a real action, and is the admission of an act which never took place. *Salk.* 246. Hence, therefore, it does appear to be the more correct expression to say that a mortgagee is entitled to his action of ejectment as one of the powers belonging to him in the character of mortgagee, and not because the mortgagor is a disseisor and therefore sueable as a trespasser or wrong-doer. The doubt which appears to have given rise to the discussion of this question is noticed in pages 163, 4, *infra*.

Mortgagor cannot disseise mortgagee. [But see infra, 1154, for Sir T. Plumer's comment on the case cited.]

As to the distinction between actual disseisins and disseisins at the election of the party, see *Butl. Co. Lit.* 330 b. n. 1. 2 *Sand. U. & T.* 18, 19, and 21, 3d edit. (p. 21, 2d edit. See also *Blunden v. Baugh*, *ubi supra*; and *W. Jones*, 315, 316, where the judges held, that if a tenant at will make a lease for years rendering rent, and his lessee enter and pay rent, that can be no disseisin, unless at the election of the first lessor. See also on disseisins in general, 1 *Burr.* 111. 113. (comparing 3 *Price*, 575, with 3 *Pres. Abs. Pref.* vi.) *Doe v. Moody*, 1 *Sand. U. & T.* 41. *Doe v. Lynes*, 3 *Barn. & Cress.* 388. *Infra*, 1154.

(C) Or his assignee, although the lease be made before the assignment of the mortgage. *Thunder v. Belcher*, 3 *East*, 449.

(C 2) To enable a mortgagor to make a valid lease, he must either obtain a prior re-conveyance from the mortgagee, or procure the latter to concur in the lease. In *Costigan v. Hastler*, 2 *Sch. & Lef.* 160, it was considered, that

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Assignee of mortgage. Of leases by mortgagor.

where an ejectment was brought for a warehouse in London, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mortgagor, who had continued in possession; the lease was at a rack rent. The mortgagee had not notice of the lease, nor the lessee notice of the mortgage. The defendant offered to at-torn to the mortgagee before the ejectment was brought; the plaintiff was willing to suffer the defendant to redeem. There was no notice to quit, so that, although the written lease was bad, yet if the lessee was to be considered as tenant at will from year to year by construction, the plaintiff's action must fail. The question was, whether by the agreement understood between the mortgagors and mortgagees, which was, that the latter should receive interests, and the former keep possession, the mortgagee had given an implied authority to the mortgagor to let from year to year at a rack rent, or, whether he might not treat the defendant as a trespasser, and wrong-

the tenant could not, under such an agreement, compel the mortgagor to redeem for the purpose of granting a valid lease; but the circumstances of that case were very special. One Parker being seised in fee of an equity of redemption of lands in mortgage, entered into an agreement to grant a lease to Alley in trust for Hastler. The latter got into possession, and advertised the lands to be let. The plaintiffs offered a rent of 221*l.* and were declared the tenants. A lease for three lives was prepared by Hastler from Alley to the plaintiffs, and executed by the latter, but not by Alley, and was retained by Hastler, under pretence of procuring Alley's signature. The plaintiff entered into possession of part of the premises. Hastler subsequently distrained for rent. To prevent a sale of the distress, the plaintiffs gave three notes of hand to a trustee for Hastler, subject to a settlement of accounts, on which notes but without a settlement of accounts, actions were brought by Hastler. The original bill was filed by the plaintiffs for relief, praying that the notes of hand might be cancelled, and Alley be obliged to execute the lease. After filing the bill, the mortgagee obtained a decree for sale, and the plaintiffs were put out of possession; on which they amended their bill, and prayed that they might be restored to the possession, or that Hastler should be ordered to pay them the value of their interest in the lands, which had considerably risen in value. The decree was, that the contract for the lease should be set aside, that the plaintiffs should account for the rent due on such part of the lands of which they had had possession during the period of their occupation, that the master should set a fair rent on those lands, and ascertain the amount due at the time of the distress; and it was ordered that the proceedings on the notes of hand should be stayed, and the actions discontinued, and the notes brought into court.

doer (D)? And Lord Mansfield said, in delivering the opinion of the court, that on full consideration, they were all clearly of opinion, that there was no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It was rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action (E); but here the question turned upon the agreement between the mortgagor and mortgagee. When the mortgagor was left in possession, the true inference to be drawn was an agreement that he should possess the premises at will *in the strictest sense*; and therefore no notice was given him to quit (F); and he was not entitled to reap the crop, as other tenants at will were, because all was liable to the debt, on payment of which, the mortgagee's title ceased. The mortgagor had no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent, to leases where a fine was taken on a renewal for lives. The tenant stood exactly in the situation of the mortgagor. The possession of the mortgagor could not be considered as holding out a false appearance. It did not induce a belief that there was no mortgage, for it was the nature of the transaction, that the mortgagor should continue in possession. Whoever wanted

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except where mortgagee encourages lessee to improve premises.

Lessee, to be secure, should examine lessor's title.

(D) The words of his Lordship were, "or whether he may not treat the defendant as a trespasser, disseisor, or wrong-doer. No case has been cited where this question has been agitated, much less decided. The only case, at all like the present is one that was tried before me on the Home Circuit (*Belchier v. Collins*); but there the mortgagee was privy to the lease, and afterwards by a knavish trick wanted to turn the tenant out." But it should seem that mere knowledge of the lessee's occupation will not be sufficient to entitle him to a notice to quit from the mortgagee or his assignee. *Thunder v. Belcher*, 3 East, 449.

Disseisin.

Notice to quit.

(E) In *Wheatley v. Bucknell*, Cowp. 473, it was expressly decided, that an unstamped agreement to grant a lease, on the faith of which the tenant had built a house, was a good defence to an ejectment. This doctrine, however, is now over-ruled, vide *Doe v. Clare*, 2 T. R. 739, where Lord Kenyon said, that it was the opinion of all the judges, that the rule in *Wheatley v. Bucknell*, could not at all events extend to the case of a purchaser.

Case confirming text, over-ruled.

(F) But if there be a tenant from year to year, and the landlord mortgages pending the year, the tenant will be entitled to six months notice to quit from the mortgages. *Birch v. Wright*, 1 T. R. 378.

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Notice to quit.

examine the title-deeds. In practice, indeed, especially in the case of great estates, that was not often done, because the tenant relied on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule was *qui prior est tempore, potior est jure*. If one must suffer, it must be he who had not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, could recover, he would also be entitled to the mesne profits from the tenant in an action of trespass; which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. His Lordship gave no opinion on that point, but there might be a distinction; for the mortgagor might be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee till he determined his will. As to the lessee's right to reap the corn, which he might have sown previous to the determination of the will, that point did not arise in this case, the ejectment being for a warehouse: but however that might be no bar to the mortgagee's recovering in ejectment, it would only give the lessee right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton was clear.

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Mortgagor a disseisor, and his tenant a wrong-doer (g). Title of disseisor, and his feoffee distinguished.

But there seems to be no occasion, in this case, for any imputation of an authority from the mortgagee to the mortgagor to receive the rents and profits. For although the possession of the lessee of the mortgagor, under a lease from him, will make him a wrong-doer as to the mortgagee, his lessor being, as to the mortgagee, a disseisor, and consequently incapable of conveying a good title as against the mortgagee: yet, I apprehend, the lessee will not be in a worse case than a tenant under a disseisor, which, by granting the underlease, the mortgagor hath made himself at the election of the mortgagee. And a distinction has been taken between the case of the disseisor, and that of him who comes in under the disseisor by title (g); for if a man be disseised, and the disseisor, during the disseisin, cuts down the trees, or grass, or the corn, growing

(g) *Lifford's case*, 11 Co. 51.

(G) As to this point, see note (A) page 156, ante.

upon the land, and afterwards the disseisee re-enters, the disseisee shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c. for, after his regress, the law, as to the disseisor and his servants, supposes the freehold always continued in the disseisee. But, if the disseisor makes a feoffment in fee, gift in tail, lease for life, or years, and afterwards the disseisee re-enters, he shall not have trespass *vi et armis*, against those who come in by title; for this fiction of the law, that the freehold continued always in the disseisee, shall not have relation to make him, who comes in by title, a wrong-doer *vi et armis*, because, *in fictione juris semper æquitas existit*. But, in such case, the disseisee shall recover all the mesne profits against the disseisor, in the same manner as the disseisee should recover in an assize at the common law before the statute of Gloucester, cap. 1. damages only against the disseisor: besides, it is to be presumed, that he who comes in by title has given some recompence to the disseisor, and that the lessee has paid rent to him, or other consideration, and therefore, in reason, the disseisor is to be charged with the whole.

Lessee not liable to action for mesne profits.

But, as to the right to the emblements, a distinction is taken between tenants who have particular estates that are un-

Tenant of mortgagor not entitled to emblements (H).

(H) It is truly said by Lord Chief Baron Comyns, in his Digest, tit. Biens, G. 2. that if a man enter by title paramount, he shall have the emblements, as if a disseisor sow and the disseisee enter either before or after severance. Co. Litt. 55 b. Mo. 24. Bro. Emb. 10. 12. 17. 20. Dyer, 31 b. Dal. 30. To apply this to the case of a mortgagor and his tenant, it is observable that, with respect to the mortgagor, the reason why he is not entitled to emblements, is, not because he is a disseisor, but because the crop, as well as the land, is a security for the debt, ante, 156.; and with respect to his lessee for years, the reason why he is not entitled to emblements, is, because he is in the nature of a disseisor, his entry being tortious and his title wrongful. There is not, however, any decision as to this latter point, and it engenders a hardship, which it is possible the court would not be disinclined to tolerate.

Mortgagor and his tenant distinguished as to emblements.

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When it is said that as between mortgagee and mortgagor, the mortgagee is entitled to emblements, the meaning is, that when the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to the mortgagee by the sheriff or otherwise, the growing crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use; but the principle does not apply to the case

As to emblements and growing crops.

certain, defeasible by the act of the parties to the original contract, or by the act of God: and those who have particular estates uncertain, defeasible by a right *paramount*; for, in the latter case, he that hath the right paramount shall have the emblements; as although, *quoad actionem*, the law will not by a fiction make the lessee, who comes in by title, liable to punishment as a trespasser (*h*); yet, *quoad proprietatem*, the regress of the disseisee revests the property in him, as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself. For the rule and reason of the law is, that after the regress of the disseisee, the law adjudges that the freehold has continued in him, which rule and reason extends as well to the emblements, as to the freehold; and although the act of the disseisor may *alter* a man's action, yet his act cannot *take away* his action, property, or right.

Lessee of disseisor not entitled to grass, and trees severed from freehold, (which, if carried away, may be followed);

And the law is the same, if the feoffee or lessee sows the land, or cuts down trees or grass, and severs and carries away, or sells them to another. Yet after the regress of the disseisee, he may take the corn, as well as the trees and grass, from whatsoever place they are carried to; for the regress of the disseisee has relation, as to the property, to continue the freehold against them all in the disseisee *ab initio*, nor can the carrying them off the land alter the property; and if the

(*h*) 19 Hen. 6. 17. 38 Hen. 6. 27. 39 Hen. 6. 18. Gilb. Dev. 135.

Mesne profits.

where the growing crops have been carried off by the mortgagor, before the mortgagee obtains possession, and between the time of his demand and recovery of the possession. Let it be supposed that a mortgagee recovers the possession by ejectment from a mortgagor who had personally occupied the property, after the crops are severed and sold. Such a mortgagee might probably, if he thought it worth his while, bring an action for the mesne profits from the time of the demise laid, but he could not recover from the mortgagor any thing more than the same occupation rent which he could have recovered against a tenant of the mortgagor, whose tenancy had commenced subsequently to the mortgage and without the privity of the mortgagee. *Semb.* per Vice-Ch. in *Temple Ex parte*, 1 Glyn. & Jam. 218. Et vide *Hodgson v. Gascoigne*, 5 B. & A. 88, in which case it was held, that after judgment in ejectment at the suit of the landlord, the value of the growing crops, though sold or seized in execution, might be recovered in an action for mesne profits, if the sale or execution were subsequent to the day of the demise laid in the declaration.

disseisee takes them, they shall be recovered in damages against the disseisor.

Nor do I see any ground upon which the case of a tenant under a mortgagor can be distinguished, as to the right of emblements, from any other tenant under a tortious title; for, if he be considered a wrong-doer as to his occupation of the premises, he cannot be considered in a different character as to the emblements: nor is there any room to imply a consent to cultivate the property, when no implication is admitted of a consent to occupy it. As if an authority can be implied in the mortgagor from the mortgagee to permit the cultivation, the same principle, by analogy, will justify such an implication that he had an authority to demise, which, in the principal case, was not admitted. no more than any other tenant under a tortious title. [163]

But such lease will be good against the mortgagor and all strangers, and will entitle the lessee to the equity of redemption (i) (1). Mortgagor bound by his own lease;

But the mortgagor would, it is apprehended, be bound by the lease, if he did any act amounting either to an express or implied assent to it (k). and mortgagee too, if he acknowledge it.

If a mortgage of lands be made under a power to pay portions out of the profits, the profits received by the mortgagor, under a clause, that it shall be lawful for the mortgagor to take the profits without account, until default of payment, shall be taken as received by the mortgagee, and shall be considered as the same thing as if the mortgagee had let it to any other person (k); and therefore the profits so received by the mort- Trustees to raise portions out of profits, permitting mortgagor to enjoy till default, must account for rents received by him during that period.

(i) *Rand v. Cartwright*, 1 Cha. Ca. (k) Vide 2 P. W. 20. Atk. 351, 2. 59, et vide 3 Cro. 304. [As to the latter point, see post, 261.—Ed.] [S. C. ante, 71.—Ed.]

(I) As to a lease made after the mortgage, or in which the mortgagee joins, or which is made by the mortgagee alone, see the next chapter, pages 179. 185. 187, and Index, *vide* Lease.

(K) Acceptance of rent would (it is presumed) be a clear assent to the lease, but mere acquaintance with the lessee and knowledge of his occupation, would not, ante, 159 *b*, note (D).

gager, shall be accounted for as having gone towards payment of the portion, and the land shall only be subject to what remains due. And the mortgagee must recover his money so far as it has been received out of the profits against the mortgagor for the time being, and his personal representatives, and will have no remedy against the trust.

Mortgagor tenant at sufferance to assignee of mortgage.

If the mortgagee assigns a term conveyed to him by way of mortgage, with a clause, that the mortgagee shall retain the possession, without the mortgagor joining in, and being a party, the assignment determines the similarity of his estate to an estate at will, and makes the mortgagor in the nature of a tenant at sufferance (l).

Covenant for mortgagor to enjoy till default, runs with assignment of mortgage.

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But in the case of *Smartle v. Williams* (m), a question arose, whether an assignment by the mortgagee alone did not operate, so as to make the mortgagor's continuing in possession under such a clause, a disseisin or divesting of the term, and turn it to a right; for if it did, the assignee could not assign it over, without he either made an entry, or the mortgagor joined. And it was held by Holt, C. J. that the mortgagor's continuing in possession would never make a disseisin nor divesting of the term, or turn it to a right; for a tenant at sufferance has but a bare possession, and no freehold (L); and Eyre, Justice, said, that the covenant to suffer the mortgagor to continue in possession, governs all the subsequent assignments; because it is agreed by the mortgagee, his executors, administrators, and assigns, that the mortgagor shall hold till default of payment; which creates a tenancy at will upon all the mesne assignments.

(l) Skin. 423. [See ante, 156, 7, T. Holt, 478. Comb. 247. Cr. Car. 302. 307.]
note (A).—Ed.]

(m) Salk. 245. 3 Lev. 387. Rep.

Entry of mortgagor's heir a disseisin. Sed qu.

(L) But it was said in the same case, that it would be otherwise if the mortgagor were to die and his heir to enter, and then the mortgagee to make an assignment without entry or the heir of the mortgagor joining, for the entry of such heir would be tortious, and consequently the mortgagee would be out of possession, and his assignment void,—*quare tamen*,

It was also contended, in the case last mentioned, that if the mortgagor's continuing in possession was not an absolute disseisin or divesting of the term, it was at least a divesting of the term at the election of the mortgagee, and then the assignee had made his election by bringing an ejectment against the mortgagor, which admitted his being out of possession; but Holt, C. J. said, that the ejectment could not admit an actual divesting, so as to turn the term to a right, for the ejectment was not brought to recover the mortgage term, but the actual possession only, for the recovery of which the assignee of the first mortgagee had no other way but this, or to make a forcible entry, which the law forbids: and his Lordship said, that the court would take notice that an ejectment was only a fictitious proceeding for recovering the possession, which could not well otherwise be obtained; and the entry laid in the declaration, or confessed by the defendant, was not an entry that was real; for it would neither avoid a fine, nor be sufficient evidence to support trespass for the mean profits.

After assignment, mortgagor tenant at sufferance, but term not turned to a right by his possession.

But if the mortgagee in the last mentioned case (n) had done any act, by which he had admitted himself to be out of possession, the consequence would have been as contended for on the part of the mortgagor; for Lord Coke says, if a man make a lease at will, and die, now is the will determined; if the lessee continue in possession, he is tenant at sufferance, and yet the heir, by admission, may have an issue of *mort d'ancestor* against him; and so it is said in Dyer, that if tenant for years surrenders, and still continues in possession, he is tenant at sufferance, or disseisor, at election.

Effect of mortgagee's admission, that he is out of possession.

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If a mortgagor commit waste (o), whether it be a mortgage in fee, or for a term of years, the court, on a bill by the mortgagee to stay waste, will grant an injunction; for they will not suffer a mortgagor to prejudice the incumbrance (m).

Waste by mortgagor restrained.

(n) Dyer, 62. Co. Lit. 57 b.

if his security be deficient. Finch,

(o) *Farrant v. Lovell*, 3 Atk. 723.

225; and see 3 Atk. 209. 254. 319.

[But mortgagee permitting mortgagor to commit waste, cannot be relieved

4 Dow. 29, and post, 188. Dick. 75. 2 Madd. 748.—Ed.]

(M) A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security, *Timber, underwood.*

Mortgagor cannot bar mortgagee by fine and non-claim.

It is a settled doctrine, that a mortgagor in possession cannot bar a mortgagee by a fine and non-claim (*p*); for, although the mortgagee be in reality out of possession, yet, where that is done by the consent of both parties, and the nature of the contract requires that it should be so while the interest is paid, it would be against the original design of the contract, that any act of the mortgagor, except the payment of the money and interest, should deprive the mortgagee of his security. And therefore it seems that no actual entry is requisite by the mortgagee, to avoid such fine.

Recovery by tenant in tail confirms prior mortgage.

A recovery suffered by a mortgagor tenant in tail, lets in all precedent incumbrances (*q*). Thus, where tenant in tail demised lands for ninety-nine years, by way of mortgage (*r*), and

(*p*) 1 Vent. 82. 1 Lev. 272. 2 Ves. Carth. 101. [Same as to mortgagee, 482. *Focus v. Salisbury*, Hard. 402. post, 212.—Ed.]
 Noy's Rep. 23. *Fermor's case*, 3 Co. (*q*) *Porter v. Emery*, 1 Cha. Rep. 97.
 77. *Cruise on Fines*, 233. Sid. 460. (*r*) *Goddard v. Complin*, 1 Cha. Ca. 119.

and the injunction may be extended to cutting down the underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor may be insolvent. *Humphreys v. Harrison*, 1 Jac. & Walk. 581. As to what is underwood, *Rex v. Ferrybridge*, 1 Barn. & Cress. 375. So in *Usborne v. Usborne*, 1 Dick. 75, a mortgagor in possession was restrained from cutting down timber on the mortgaged premises after some hesitation, the court at first thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession. In *Hampton v. Hodges*, 8 Ves. 105, a mortgagee of timber trees, wood and underwood, moved for an injunction to restrain cutting the underwood; a commission of bankruptcy had issued against the mortgagor; and no assignees had then been chosen. Lord Eldon said, if the mortgagee will not take possession, the mortgagor must cut the underwood in the ordinary course, if at unseasonable times, or of improper growth, his Lordship would grant an injunction. But was there ever an instance of preventing the mortgagor taking the ordinary fruit of the land? Suppose the course was to cut the underwood every seven years; the mortgagor in possession cutting in that way, would not be guilty of waste.—A mortgagee at law may commit waste; and the mortgagor will be without remedy, unless there be an express covenant not to commit waste. *Evans v. Thomas*, Cro. Jac. 172. But in equity a mortgagee will be prevented from committing waste, unless the security appear to be scanty or defective. And where a mortgagee cuts down timber, he must apply it to ease the estate, first the interest, and then the principal of his mortgage. *Wetherington v. Banks*, Sel. Ca. Ch. 30. *Hansard v. Darby*, 2 Vern. 392. *Farrant v. Lovell*, 3 Atk. 723.

then married, and suffered a recovery to enable him to make a jointure; one question was, whether the recovery should enure to make good the mortgage, it being designed for the marriage settlement only? And it was determined that it should; for, if no recovery had been, there could have been no jointure, and the jointress could not have avoided the mortgage; she was in by the act of her husband, and no subsequent act of his could avoid his own act precedent: and though the recovery was suffered to a collateral purpose, yet it would enure to make good all precedent acts and incumbrances (N).

(N) A similar point was determined in the case of *Goodright v. Mead*, 3 Burr. 1703; and in *Hart v. Middlehurst*, 3 Atk. 376, Lord Hardwicke said, the reason of it was, because the tenant in tail is considered as owner of the estate. His Lordship also observed, in the same case, that whether the incumbrance were legal or equitable, it would not make any difference. In either case it would be confirmed. This, however, must be understood with some qualification, as if the incumbrance be a mere equitable one, and the recovery be declared to the use of a purchaser for a valuable consideration without notice of the incumbrance, there, it should seem, the recovery would certainly not confirm the precedent charge. So, if a tenant in tail make an equitable mortgage, or create an equitable lien, as by articles for a settlement or otherwise, and then suffer a recovery, and convey the legal estate in the premises to a purchaser or second mortgagee for a valuable consideration and without notice of the prior equitable charges and estates, this recovery would not operate to confirm the first mortgage, nor the equitable lien, nor the articles. See Mr. Atherley's note (g) to Shep. Touch. 49. 50; also Ath. Sett. 44, n. (a). Cov. Rec. 190. *Infra*, 252; and for the principal case, see *Benson v. Hedson*, 1 Mod. 108. Post, 190. 212.

Recovery does not confirm equitable charge against legal mortgagee without notice;

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It is also, in this place, worthy of further observation, that a recovery will not operate to confirm a prior charge or estate in favor of a volunteer, even with notice, as against a subsequent purchaser or mortgagee for a valuable consideration. Thus where a tenant in tail, without suffering a recovery, executed a settlement on his marriage, by which he limited an estate for life to himself, with remainder to his first and other sons of the marriage in tail male, with remainder to his brother for life, with remainder to his sons in tail, with remainders over, and afterwards suffered a recovery on his making a mortgage of the settled estate to one R. P. who had notice of the settlement, and shortly after died without issue male; and thereupon R. P. brought a bill of foreclosure, which was decreed below. It was held by the Lords, that there was not any distinction between a tenant in fee and a tenant in tail, who had it in his power at any time to acquire the fee; that the brother of the tenant in tail and his son took new estates under the settlement, which were voluntary, and void as against the subsequent mortgagee for valuable consideration. Cor-

nor even with notice, if prior estate be in favour of volunteers.

Mortgagor cannot dispute title of mortgagee.

A mortgagor is never permitted to dispute the title of his mortgagee (s); because no man is permitted to dispute his own solemn deed (o).

Mortgagor in possession gains parish settlement.

A mortgagor *in possession* gains a settlement (t), because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money; and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security (p).

(s) *Goodtitle v. Bailey*, Cowp. 601.

(t) *Doug. Rep.* 610.

mick v. Trepaul, 6 Dow, 60. Vide etiam S. P. *infra*, 212; and see as to who shall be volunteers, *Roe v. Hammerton*, 2 Serjt. Wils. 356. *Doe v. Manning*, 9 East, 59. Ante, 97. *Infra*, 262. 2 Watk. Cop. 309.

Mortgagor cannot set up prior lease against ejectment, nor can lessee dispute title of mortgagor.

(O) And the court will not suffer a mortgagor to set up the title of a third person (as, for instance, the possession of the tenant under a lease prior to the mortgage) against the mortgagee, for he made the mortgage; and it does not lie in his mouth to say otherwise, although such lessee might have a right to enjoy the possession of the premises for the term of his lease. Nor can a tenant who has paid rent, and acted as such, set up the title of the mortgagee against the mortgagor in bar to an ejectment brought against him by the latter; because he holds under the mortgagor, and has admitted his tenancy; and the court will never permit a tenant to set up a title against his landlord. 2 Ves. 696. *Doe v. Pegge*, 1 T. R. 760, *in notis*. Et vide *infra*, 173, n. (B).

Mortgagor real owner. Mortgagee may gain settlement.

(P) The words of Lord Mansfield in this case (*King v. St. Michael's, Bath*, 2 Doug. 630. S. C. Cald. 110,) are remarkable:—If, says his Lordship, the estate on which a pauper resides is substantially his property, that is sufficient, whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say, *the mortgagor is not the real owner*. A mortgagor has a right to the possession till the mortgagee brings an ejectment. After the mortgagee has got into possession, he may gain a settlement. And per Buller, J. 3 T. R. 772. “In *Rex v. St. Michael's, Bath*, it was said, that either a mortgagor or mortgagee might gain a settlement *according to circumstances*. One of those circumstances is possession, and upon possession all the questions have turned.”

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Mortgagor gains settlement notwithstanding estate mortgaged to full amount.

The statute 9 Geo. 1. c. 7, enacts, that no person shall gain a settlement by purchasing any estate whereof the consideration does not amount to 30*l.* bond *fide* paid. Hence, if a pauper contract for the purchase of an estate for 39*l.* which is in mortgage for 3*l.* and having paid 7*l.* takes the conveyance, subject to the mortgage (*Rex v. Mattingley*, 2 T. R. 12,) or, if he contract for the

But if the mortgagee evict the mortgagor, and take possession, the mortgagor, though afterwards occupying permissively for a particular purpose, will not thereby gain a settlement. A pauper entitled to an equity of redemption of a free-

Not after eviction and occupation permissively, as to repair or otherwise, possession then not being as mortgagor.

purchase of an estate for 52*l.* and pays only 12*l.* but mortgages the property to the vendor for the residue; in either case he will not gain a settlement. *Rex v. Olney*, 1 Maul. & Selw. 38. Yet, if after such purchase at the full value, he obtains from B. an indifferent person, the loan of money, with which he discharges the existing incumbrances on the estate, and takes an assignment of the security, so as to vest the legal estate in himself, and then mortgages to B. for the money lent, and continues in possession for forty days after, the pauper by such arrangement will become entitled to a settlement. *Rex v. Chailey*, 6 T.R. 755. *Rex v. Olney*, 1 Maul. & Selw. 387. *Rex v. Tedford*, Burr. Sett. Ca. 57. If he can gain credit for 30*l.* the Court will not inquire from whence it comes. *Rex v. Tedford*, ib. and 1 Maul. & Selw. 390, 391.

Twenty years possession, by any means, gives a title; and therefore where a party had been in the occupation of a cottage and premises nineteen years and a half by intrusion on the waste, and then his mortgagee brought an ejectment against him and turned him out of possession, and the mortgagee continued in the occupation himself upwards of half-a-year, when he and the mortgagor sold the property, this was held to confer a settlement on the mortgagor. *Rex v. Britton*, 1 Burr. 631. 2 Bott. P. L. 482, pl. 501.

Mortgagor's title possessory, he and mortgagee must have twenty years possession between them.

In the case of *King v. Edrington*, 1 East, 288, a leasehold cottage, which the pauper's wife had purchased before marriage, was assigned by her and her first husband to a trustee in trust, that he should, by sale or mortgage, raise 10*l.* for the benefit of the parish, by whom the family had been before relieved to that amount, and after payment of the same, in trust, to re-assign the premises to the former owners. The parties always continued in possession, and it did not appear that the money was ever paid, or what was the value of the cottage. And the question was, whether, on the death of the first husband, the pauper who married the widow, gained a settlement by residing forty days in the cottage of which she had retained the possession. Lord Kenyon, C. J. in delivering the judgment of the court, observed, that the premises were assigned to the trustee for the purpose of securing the repayment of a sum of money expended by the parish for the use of the man's family, and this was equivalent to a mortgage and no more. After the expiration of the usual time given for the payment of the mortgage money, the estate became absolute in the mortgagee at law, but neither courts of law nor equity lost sight of what the parties intended. In mortgage deeds, there was sometimes introduced a clause, that the mortgagee might repay himself by sale of the mortgaged premises, without the concurrence of the mortgagor, but a court of equity would (his Lordship thought) controul the exercise of that power [contra, ante, 12, 15.] *He was sure they would controul it, in an instance like the present, upon payment of what was due.* The trustee, in such a case, would be bound to execute a re-conveyance, and in the case in question, there was an express clause to that purpose. Virtually, therefore, there was no

Assignment to pay debts equivalent to mortgage, and possession of E. of R. forty days jure uxoris, gains settlement.

hold estate (u), which had been mortgaged by his father, having been evicted by the assignee of the mortgagee, afterwards gained permission of the steward of the assignee to inhabit a house, part of the mortgaged estate, and which was then untenanted, *for the purpose of overlooking some repairs*, which he proposed to do upon the estate, with an intention to sell the same, and pay the mortgage money. In consequence of such permission, he went into the house, and inhabited the same for upwards of three months, when he was removed by an order of justices. The pauper did not, during such residence, do any thing towards the repairs of any of the houses, or towards a sale of the estate. No agreement was made between the pauper and the steward, with respect to any rent

(u) *The King v. Inhabitants of Ca- Houghton Le Spring*, 1 East, 257, and
therington, 3 T. R. 771. [Vide etiam Selw. N: P. Index, voce Mortgage.—
Rex v. Fritwell, 7 T. R. 197. *Rex v. Ed.*]

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continued.

more than a mortgage, and it ought to be governed by the same rules. With respect to the case of *Rex v. St. Michael's, Bath*, it was very plain, that the greatest stress was laid on the circumstance of the pauper's possession having been obtained by fraud. After touching upon the interest which he had in the premises conveyed, Lord Mansfield said, at the end of the case, there was still another and a stronger ground in this [*St. Michael's, Bath*,] case, for the possession was obtained by fraud. Now, if the other point had been clear, he [Lord Mansfield] would not have used such an expression. In the case before the court (Lord Kenyon continued) the possession was not fraudulent, and therefore he was of opinion that the second husband, the pauper, gained a settlement by his residence on the estate, which came to him by operation of law, on his marriage.

*Expression of
 rule as to parish
 settlements.*

The court again referred to the doctrine of Lord Mansfield, as stated in the text in the case of *Rex v. Tarrant, Launceston*, 3 East, 226, where Lord Ellenborough, C. J. expressed a wish to confine the acquisition of settlements by the possession of estates, to the strict letter of the statute 9 Geo. 1. c. 7. s. 5, namely, for so long only as there was an *union of interest and occupation in the thing*; and his Lordship said, in cases of this kind, he should be much inclined to ask with Lord Mansfield, what interest had the pauper in the estate? But the true question appears to be, whether the premises are substantially the pauper's property; and then, whether the conveyance be in the form of an absolute disposition in trust, or of a mortgage, it will not make any difference, if the possession be not fraudulent or merely permissive. See also *Rex v. Fritwell*, 7 T. R. 197, and *Rex v. Houghton Le Spring*, 1 East, 247. But these and the preceding cases, have no reference to the question of value under the statute 9 Geo. 1. c. 7. How far a mortgagee may be a purchaser within that statute, see 2 Nolan P. L. 95, 3d edition.

to be paid by the pauper for such house. The question was, whether the pauper gained a settlement by this residence? And it was held that he did not. For though it is clear that an equitable title is sufficient to give a settlement, *that* only applies where the mortgagor is in possession. But in this case he had neither *jus in re*, nor *ad rem*.

If one borrows money for another on a mortgage (x), he may file a bill against him to pay off the mortgage money, and shall not be put to his *indebitatus assumpsit*.

Mortgagee shall not be put to his indebitatus assumpsit.

The methods of redemption and foreclosing being found dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the legislature deemed it necessary to interfere, and in some degree remedied it by the 7 Geo. 2. c. 20, by which statute it was provided, that after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee shall maintain no ejectment, but may be compelled to re-assign his securities, and deliver all deeds, evidences, and writings in his custody, respecting the mortgaged premises to the mortgagor (q). And that, where a bill is filed to redeem or be foreclosed, the court may, upon application by the defendant, and upon his admitting the right and title of the plaintiff in the suit, before such suit be brought to hearing, make such order or decree therein, as would have been made in case such suit had then been regularly brought to hearing before such court (R).

Mortgagee bound to re-assign on tender of P. I. and C. Court may proceed to decree without hearing on defendant's admission of plaintiff's right;

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(x) Mosely, 318.

(Q) This is the first section of the act, and hereon it has been decided, that where a mortgagee recovered possession of the mortgaged premises, under a judgment of the Court of Common Pleas, in an undefended ejectment, in which the mortgagor did not appear, the court had not any jurisdiction to restore the possession of the premises to the mortgagor on his paying the debt with interest and costs; but that if the recovery had been against a tenant of the mortgagor, the court would have set aside the judgment, and let in the mortgagor to defend as landlord, that he might have been in a condition to apply to the court to stay proceedings on the terms of the statute. *Doe, dem. Tubb v. Roe*, 4 Taunt. 887. Et infra, 170, n. (T).

Case on first section of stat. 7 Geo. 2. c. 20.

(R) This is the substance of the 3d section of the statute, and for the cases hereon see note (T), infra, page 170.

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except where right is questioned, or it would prejudice subsequent incumbrancers.

But it is provided, that this act shall not extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other, or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit (s); nor shall be any prejudice to any subsequent mortgagee or incumbrancer.

Ejectment not stayed if mortgagor has agreed to convey E. of R. to mortgagee.

(S) In the case of *Goodtitle*, on the demise of *Taysum v. Pope*, 7 T. R. 185, the mortgagor, in bar to an action of ejectment in the Court of King's Bench by the mortgagee, set up a right to redeem, on the argument of a rule nisi, which had been obtained, calling on the mortgagee to shew cause why the ejectment should not be stayed on payment of principal, interest, and costs. The plaintiff (the mortgagee) produced an affidavit, in which it was stated, that in the year 1792, [a time after the date of the mortgage (it is presumed), but that fact does not appear on the report,] the defendant (the mortgagor) had, by an agreement under seal, in consideration of a certain sum, agreed to convey the premises to the mortgagee absolutely; and that a sum of money due from the mortgagor to the mortgagee, should be deducted out of the purchase money so to be paid, and that several applications had been since made to the mortgagor, to complete the purchase, which he had refused. The counsel for the mortgagor admitted the agreement, but contended, that such an agreement to convey was not within the proviso of the act. Lord Kenyon, C. J., however, held, that the mortgagor had not any right to redeem, for that a court of Equity would decree him to complete his contract made in 1792. The application, his Lordship said, was against the justice of the case, and if he were to listen to it and strip the mortgagee of his legal title, it might let in a posterior equitable right, to the prejudice of the mortgagee, though he (the mortgagee) should thereafter obtain a decree for the performance of the agreement. The court would not therefore stay the proceedings in the ejectment, and the rule was discharged.

Contra if no conveyance tendered.

There is also a short note of a case to the same effect in Mr. Serjeant Wilson's Reports, 1st vol. 80, (*Skinner v. Stacey*). The defendant, being a prisoner, moved, that upon paying principal, interest, and costs, to be computed and taxed by the Master, all proceedings in an ejectment on a mortgage deed might be stayed upon the statute 4 & 5 Ann. [a statute not to be found].

A reference to a Master in Chancery to take an account, under this statute, must proceed upon admission of the principal and interest due upon the mortgage (*y*); and the Master cannot admit evidence (*T*). *Therefore P. and I. must be admitted on reference.*

(*y*) Vide *Huson v. Hewson*, 4 Ves. 105.

and that he (the defendant) might be discharged out of custody. The counsel for the plaintiff objected that the defendant had agreed to convey to the plaintiff the equity of redemption; but, it appearing upon an affidavit read, that the plaintiff had not tendered to the defendant a deed of conveyance to be executed, and that no bill in equity was brought, the court granted the motion after taking time to consider.

(*T*) To dispute that admission, or examine into the *quantum* of what is due, 4 Ves. 106; and in a case where the bill was not confined merely to foreclosure, but claimed a distinct demand beyond the mortgage, it was decided, that no order or reference could be made under this statute. *Bastard v. Clarke*, 7 Ves. 489. So in a case where the mortgagee was, by proceeding at law, entitled to execution, no relief was allowed under the statute. *Amis v. Lloyd*, 3 Ves. & Bea. 15. *Supra*, 168 *a*, n. (*Q*). *Recent cases in equity on stat. 7 Geo. 2. c. 20.*

Though the defendant may be entitled by the statute to come in upon motion, and have an immediate reference, yet if he be in contempt for want of an answer, he will not be permitted to move for a reference. *Hewit v. McCartney*, 13 Ves. 560. The jurisdiction, under the statute, giving the effect of a decree for a foreclosure by a short order, is the same as if the cause were brought to a hearing. The time for payment therefore of the mortgage money may be enlarged on the usual terms. *Wakerell v. Delight*, 9 Ves. 36. 6 C. Coop. 27. In another case, on a motion for a reference, under this act, the court refused to direct the Master to take into the account costs incurred at law, no mention of proceedings at law being made in the bill; but the court gave leave to amend the bill in that respect, and directed the motion to stand over until the bill was amended. *Millard v. Magor*, 3 Madd. 433. But a decree under this statute, though made on motion, cannot be discharged on motion. *Calde v. Fowell*, 1 Bro. Ch. Ca. 514.

It is further observable on this statute, that where after judgment for the plaintiff in ejectment the mortgagor prayed to bring the money into court, the application was refused, Page and Chapple, Justices, observing, that though liberty be given to bring in the money pending the action, yet, after the suit has been determined by judgment, the court cannot comply with the mortgagor's motion. *Wilkinson v. Traxton*, Serjeant Leeds MS. 2 Selw. N. P. 683, 5th edition. Before a court of law will proceed on this statute, there must be an affidavit that no suit in equity is depending, *ib.*; and a defendant, in order to stay proceedings at law under an ejectment, must apply before the plaintiff is entitled to take out execution. *Amis v. Lloyd*, 3 Ves. & Bea. 15. and where the title-deeds and mortgage are not delivered up, the money must be paid into court, unless the plaintiff or his attorney will undertake to deliver them. *Dandon v. Jacob*, Tidd's Prac. 563, 7th ed. If there be any doubt as to the

Mortgagor in possession may vote for knights of shire, and so may mortgagee if in possession.

By the 7 W. & M. c. 25. It is enacted, "that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust, estate, or mortgage, unless such trustee or mortgagee be in actual pos-

amount of what is due, the court of King's Bench will refer it to the Master, and the court of Common Pleas to one of the prothonotaries who taxes the costs: *Berthen v. Strest*, 8 T. R. 326. And where an affidavit was made, that the mortgagee had been at great expence in necessary repairs of part of the premises in his possession, (the ejectment being brought for the residue,) and it was prayed that the prothonotary might be directed to take allowances for such repairs, the court said, that the rule must follow the words of the statute, and that the prothonotary would make just deductions and allowances; *Barnes*, 176. *Adams Ej.* 494. In a case where the mortgage deed enabled the mortgagee to sell, and upon an ejectment and a rule obtained upon the statute, the mortgagee having set up a claim for some expences occasioned by sale under the mortgage deed, the Chief Baron observed, that the only charge specified was of a nature which might be very well settled by reference to the Master, and accordingly the rule was made absolute. *Goodtitle v. Lansdown*, 3 Anstr. 937. It has also been holden that the rule, with respect to tacking in an ejectment, shall be the same as in equity. Therefore, upon a reference to the Master, the court has refused to tack a bond debt to the mortgage as against the mortgagor or his assignee of the equity of redemption, but has intimated that it might be done against the heir. *Bingham v. Gregg*, *Barnes*, 182. And it has been decided in equity, that if the bill embraces any object distinct from the foreclosure of the mortgage, as for example, if it sets up another demand on the defendant, and prays it may be also a charge on the estate, no order of reference can be made under the statute. Lord Eldon has remarked, that the justice of the case seems to be, that the reference should be made as to the mortgage, and the cause go on as to the rest, but he had never known it done. *Bastard v. Clarke*, 7 Ves. 489.

This act expressly gives authority to courts of equity, in a suit for foreclosure, to stay the proceedings in any stage of the cause, upon the defendant's submitting to the same decree, as the plaintiff would, according to the case made by the bill, be entitled to at the hearing of the cause. It has frequently been stated; and it seems with truth, that courts of equity did not require the aid of the legislature in this particular, and that the real purpose of the statute was to give a new jurisdiction in the case of mortgages to courts of law—the section, as to courts of equity, being merely incidental and unnecessary. With this impression the late case of *Praed v. Hull*, was decided. In that case a bill was filed by mortgagees, against the mortgagor and also against a subsequent mortgagee (who had a power of sale), praying that the mortgaged estate might be sold to satisfy the claims of the plaintiffs. Upon this the mortgagor moved the court for a reference to the master to take an account, and prayed that all proceedings might be stayed in the mean time. The court said that this bill being for a sale and not for a foreclosure was not within the above-named statute, but inasmuch as a court of equity had inherent juris-

session or receipt of the rents and profits of the same estate; but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust." (U)

diction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant would at once submit to a decree establishing the full demand made by the bill and costs, it would, in the instance before it, exercise that jurisdiction and decree an account and stay the proceedings in the interim; which was accordingly done. *Præd v. Hull*, 1 Sim. & Stu. 352.

In an action of covenant on a mortgage deed, a rule was lately moved for in the court of King's Bench, calling upon the defendant to shew cause why it should not be referred to the Master to ascertain what was due for principal and interest upon the deed on which the action was brought, and why, upon payment of principal and interest, together with the costs of the action, the mortgagee should not be directed to give up the mortgage deed to the mortgagor?—Bayley, J. observed, that to grant the motion seemed to be converting the court of King's Bench into a court of equity. However the rule *nisi* might as well be granted as cause might afterwards be shewn, the court accordingly granted a rule *nisi* which was afterwards made absolute but without opposition. *Anon.* 2 Chit. Rep. 264. It does not appear to have been usual (adds the learned reporter) to grant the rule in the extent to which it was carried in this case. The statute enacts, that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where an action of ejectment shall be brought by any mortgagee it shall be lawful for the party entitled to the equity of redemption, at any time pending such action, to bring into court the principal money and interest, &c. and by rule of court to obtain a reconveyance, &c. *ubi supra*.

(U) But the mortgagor in possession will not be permitted, to vote if the interest of the mortgage money reduces the value of the premises below forty shillings. Heyward on Conn. Elec. 94. And to entitle a mortgagee to sit in parliament, he must have been in possession of the premises for a period of seven years by the statute 9 Ann. c. 5. s. 4. post, 213. County elections.

With respect to electors for boroughs and towns, it is observable that in one case where a mortgage was paid off by a loan from a third person to the mortgagor, without interest, three months previously to an election, the mortgagee being then in possession, and it appeared that the mortgagor after the election had made a new mortgage to the lender for the money advanced and interest, the vote of the mortgagor was held bad, though he was in possession at the time of the election. See Male on Elec. 296. Borough elections.

CHAP. VIII.

OF THE ESTATE OF THE MORTGAGEE, &c.

*Views to be
taken of mort-
gagee's interest.*

TO form an accurate idea of the nature of the interest of a mortgagee in the estate pledged as a security, he must be viewed at four periods of time: First, At the instant of executing the mortgage, and before forfeiture, while possession is (as is usually the case) in the mortgagor. Secondly, After the mortgage is forfeited by non-payment of the money at the day, and before the mortgagee enters into possession. Thirdly, After the mortgagee enters into possession on the eviction of the mortgagor. And fourthly, On foreclosure, of which we shall speak at large hereafter (A).

*Mortgagee's es-
tate before for-
feiture.*

The estate of the mortgagee (a), until forfeiture, still continues as it was at common law, before the interference of courts of equity: he is entitled to an estate as tenant in mortgage in fee, or for term of years, subject to any agreement made between him and the mortgagor relative to the possession, and defeazable at law by performance of the condition. As soon as the estate is created, he may enter into possession; but as the payment of the interest is the principal object of the mortgagee, he seldom avails himself of that right, unless obliged so to do, to secure payment of the interest, or with a view to compel the repayment of the money.

*Leases of mort-
gagor void
against mort-
gagee.*

It follows from hence, that all leases or other interests in the land made or conveyed by the mortgagor subsequent to the

(a) Vide 1 Atk. 170.

(A) To these four general heads, the reader will expect to find the particulars of this chapter reduced, but the author, it is to be lamented, has not followed this nor any other particular division in the ensuing consideration of the estate and interest of the mortgagee. Indeed, it is sincerely to be wished, that he had adopted a more succinct arrangement of his work, or at least, that he had introduced some kind of subdivision into chapters, which embrace such an extensive variety of matter.

mortgage, though before forfeiture, are void against the mortgagee (b). As to him the tenants under such leases, or persons claiming such interests, may be considered as trespassers, disseisors, and wrong-doers.

On the same principle, the mortgagee (since the statute 4 Ann. c. 16. to dispense with the necessity of attornment of tenants) on notice becomes entitled to the rent of the premises mortgaged (if let) from the time of executing the conveyance; for the rents and profits are liable to the debt as well as the premises themselves. This was determined in the case of *Moss v. Gallimore* and another (c), upon a special case reserved in an action of trespass at the assizes for Staffordshire. The case was as follows: One Harrison, being seised in fee, on the first of January, 1772, demised certain premises to the plaintiff, Moss, for twenty years, at the rent of 40*l.* payable yearly on the 12th of May; and in May 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but 28*l.* which was due before the month of November, 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, shewed him the mortgage-deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz. on the 31st of December; but when Harwar said that Gallimore would distrain for it, if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff in the following words: "Take notice, that I

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Mortgagee, on notice, entitled to rent on lease made prior to mortgage, and to all arrears at time of notice, for which he may distrain without ejectment.

(b) *Keech v. Hall*, supra. [156. et vide ante, 162, 3. et post, 288.—Ed.] (c) *Doug. Rep.* 263. [279. 4th edit. and see post, 175, 6, in notis.—Ed.]

“ have this day seized and distrained, &c. by virtue of an authority, &c. for the sum of 28*l.* being rent, and arrears of rent, due to Esther Gallimore, at Michaelmas last past, for, &c.; and unless you pay the said rent, &c.” He accordingly sold cattle and goods to the amount of 22*l.* 2*s.* The question stated for the opinion of the court, was, whether, under all the circumstances, the distress could be justified? And the court determined that it might, saying this case was, in its consequences, very material. It was the case of lands let for years, and afterwards mortgaged; and considerable doubts in such cases had arisen in respect to the mortgagee, when the tenant colluded with the mortgagor; for, the lease protecting the possession of such a tenant, he could not be turned out by the mortgagee. Of late years the courts had gone so far as to permit the mortgagee to proceed by ejectment, if he had given notice to the tenant that he did not intend to disturb his possession, but only required the rent to be paid to him, and not

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Mortgagee may recover in ejectment against lessee prior to mortgage, if he undertakes not to disturb lessee's possession (B).

Doctrine in text over-ruled. Mortgagee cannot recover if lease be prior to mortgage, et infra, 176.

(B) In the course of the arguments at the bar, in the case of *Keech v. Hall*, ante, 156. Doug. 23, (n. 7.) Lord Mansfield said, he entirely approved of what had been done by Nares, Justice, on the Oxford Circuit, and afterwards confirmed by that court, in the case of *White*, lessee of *Whatley v. Hawkins*, viz. not to suffer a lessee, under a lease prior to the mortgage, to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee does not intend to turn him out of possession. And his Lordship again recognised the rule in *Doe v. Pegge*, 1 T. R. 760, in *notis*, as well as in the case in the text. It has, however, been considerably shaken, if not entirely over-ruled, in a subsequent case before Lord Kenyon, (*Doe v. Staple*, 3 T. R. 684) wherein it was held, (against the mortgagee) that in ejectment the plaintiff must recover on a legal title, even though he may claim only subject to the charge. (Buller, J. *dissentiente*, adhering to the doctrine of Lord Mansfield.) And in the case of *Doe v. Wharton*, 8 T. R. 2, the court were unanimously of opinion, that a plaintiff, who claimed under an *elegit*, executed subsequently to a lease granted to the tenant in possession, could not recover in ejectment, although he had given the tenant notice that he did not mean to disturb his possession, his object being merely to get into the receipt of the rents and profits of the estate. That an equitable title, with the legal estate outstanding in a trustee to attend the inheritance, will not support an ejectment. See *Doe v. Vernon*, 7 East, 8. *Doe v. Morris*, 2 Taunt. 54. Hence the inconvenience of excepting or taking an assignment of an outstanding term in the mortgage deed or conveyance, as, to prove the title in ejectment, that instrument must be produced, and on profert of the deed, it will appear that the legal estate is outstanding in another person,

to the mortgagor. This, however, was entangled with difficulties. The question here was, whether the mortgagee was or was not entitled to the rent in arrear? Before the statute of Queen Anne attornment was necessary, on the principle of notice to the tenant (c); but when that took place, it certainly

and the plaintiff's nonsuit will be inevitable, unless he has taken the precaution of laying the demise in the name of his trustee.

See also *Doe v. Wroot*, 5 East, 132. *Rowe v. Lowe*, 1 H. Bl. 446; and *Goodtitle v. Jones*, 7 T. R. 43, where it was held, that a satisfied term, if not found by the jury, upon a special verdict, to have been surrendered, will bar a recovery in ejectment. But the general rule is, that a tenant is not permitted to dispute his landlord's title to confer possession at the time of the demise, although he may certainly shew that the title has determined since, *Alchorne v. Gomme*, 2 Bing. 60; and it should be observed, that in certain instances a court of equity will enjoin the person having the legal estate from setting up the conveyance to him, or compel that person to permit his name to be used in the demise; per Lord Chan. Manners, in *M'Guire v. Armstrong*, 2 Ball & Bea. 538. This subject is treated of more fully, *infra*, p. 510.

(C) The reason for attornment, says Lord C. B. Gilbert, in his *Treatise on Tenures*, p. 41, was threefold, 1st. That the tenant in possession might not be subjected to a stranger, or a new lord, without his own approbation; 2d. That he might know to whom he was to render his services, and distinguish the lawful distress from the tortious taking of his cattle; and, 3d. That by such attornment the grantee of the reversion or seignory might be put into possession of it, and that others might be apprized of the transfer. The necessity of attornment is, however, now almost entirely taken away by the statutes 4 & 5 Ann. c. 16. and 11 Geo. 2. c. 19. s. 11. By the former statute it was enacted, that all grants and conveyances of any manors, &c. should be good without attornment of the tenants; but it was provided that no tenant should be prejudiced by payment of rent to any grantor before notice given to him of the conveyance to the grantee (1 T. R. 385.) And by the latter statute, after reciting that the possession of estates was rendered precarious by the frequent and fraudulent practice of tenants attorning to strangers under pretended titles, it was enacted, that all attornments should be absolutely null and void, and the possession not altered thereby, except such as were made in consequence of some judgment at law, or decree in equity, or made with the privity of the landlord or lessor, or to any mortgages after the mortgage is become forfeited. Of attornment.

Till the passing of these acts the doctrine of attornment was one of the most copious and abstruse points in the law. The commentary on Littleton is plentifully interspersed with observations concerning it, and they are collected and arranged by Mr. Thomas, in the Index to his valuable edition of Coke upon Littleton. But these statutes have rendered attornment unnecessary and inoperative. The learning, indeed, on this branch of the law appears to have become so useless that not a single article on the subject is to be found in Bacon's Abridgment; and Mr. Viner, in his voluminous compilation,

had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, related to the time of the feoffment; since the statute, the conveyance was complete without the attornment; but there was a provision, that the tenant should not be prejudiced for any act done by him, as holding under the grantor, till he had received notice of the deed; *therefore the payment of rent, before such notice, was good.* With this protection he was to be considered by force of the statute, as having *attorned at the execution of the grant.* And here the tenant had suffered no injury. No rent had been demanded, which had been paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dared to prefer the former, or keep both parties at arms-length. In the case of

Of attornment. has inserted nothing respecting it, except an extract from Lord C. B. Gilbert's Treatise on Tenures.

It applies only where lease is made before mortgage.

The reason however for attornment, so far as it proceeded on notice to the tenant, is still applicable to the case of a mortgage, where the mortgage is made subsequently to the lease (2 Bing. 59); for a mortgagee will not be entitled to the rents under a lease made prior to the mortgage, until he shall have given notice to the tenant of the mortgage, and required payment of the rents to himself. Otherwise than this, actual attornment is seldom heard of in practice, except to a receiver, or in the case of a recovery in ejectment, where the tenants frequently attorn to the lessor of the plaintiff, in order to save the expence of sheriffs poundage and officers fees on executing a writ of possession.

Advantage of lease prior to mortgage, is, that mortgagee may distrain without ejectment.

The statutes of attornment were passed in case of the reversioner, and to enable a mortgagee to distrain without a formal attornment, where the reversion has been conveyed to him after the creation of the lessee's term, and where consequently he could not proceed by ejectment. The decision in *Moss v. Gallimore* applies also to the same circumstances; but if, as in *Keech v. Hall*, and in the late case of *Alchorne v. Gomme*, infra, the lessee's term be created by the mortgagor alone after the mortgage, the mortgagee can only obtain possession by ejectment, unless indeed the tenant will pay the rents to the mortgagee upon notice of the mortgage, and his so paying the rents or consenting or agreeing to do so, is an attornment. In *Taylor v. Zamra*, 6 Taunt. 524, the land was expressly subjected to distress by a charge created before the lessor's title commenced. In *Alchorne v. Gomme*, 2 Bing. 62, the Lord Chief Justice of C. P. said, that unless the tenant had attorned, though the mortgagee might have evicted, he could not have distrained. Et vide infra, 176.

executions it was uniformly held, that if any one acted after notice, he did it as his peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignee and the mortgagee, who was entitled to the rent? The assignees stood *exactly* in the place of the bankrupt. Now a mortgagor was not properly a tenant at will to the mortgagee, for he was not to pay him rent, he was only so *quodam modo* (d). Nothing was more apt to confound than a simile. When a court or a counsel called a mortgagor a tenant at will, it was barely a comparison. He was like a tenant at will; the mortgagor received the rent by a tacit agreement with the mortgagee, but the mortgagee might put an end to the agreement when he pleased. He had the legal title to the rent; and the

Mortgagee may recover of tenant rents paid to mortgagor after notice of mortgage.

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(d) *Quere* this reason—it seems otherwise—at least until forfeiture of the condition, when perhaps he may become tenant at sufferance; for the agreement to take rents and profits seems clearly to make him tenant at will (D). Vide *Geary v. Bearcroft*, Carter, 65. But as that agreement is

only until default of payment of the mortgage money.—*Quere*, if after he may not be considered as tenant at sufferance (E). N.B. The case of *Moss v. Gallimore*, then was a subtenancy. [The mortgage was subsequent to the lease.—Ed.]

(D) In *Powesley v. Blackman* it was said, that if there be a proviso that the mortgagor shall continue in possession for the time given for re-payment of the mortgage money, he will then be tenant for so many years. Cro. Jac. 659. And what can more clearly evince the position that the mortgagor is not any kind of tenant to the mortgagee, in the generally received import of that word, than that (as Lord Mansfield observes in the text) the mortgagor is not liable to pay the mortgagee any rent. It is also observable, that it has been decided that a mortgagor cannot without an express contract be charged with the payment of rent to the mortgagee, nor with a liability to rent in an action for use and occupation; for that the contract between the parties is for payment of interest, and not for payment of rent. See 2 Pres. Conv. 303. And with respect to the species of tenancy under which a mortgagor ought to be classed, the modern cases have shewn that, although some qualities of a particular tenancy may be ascribed to him, yet in others he is so widely different; that it is impossible to say he is either the one or the other. But this subject has been amply discussed in a preceding note, ante, p. 156, note (A), to which the reader is referred.

Author's query examined.

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Interest, not rent, secured by mortgage.

(E) He may perhaps be considered as a *quasi* tenant at sufferance, according to the distinction of Sir Orlando Bridgman, C. J., in *Geary v. Bearcroft*, ubi supra. Car. 66. who observed, that there were two kinds of tenants at sufferance; proper tenants, and *quasi* tenants at sufferance. Of this latter must be the mortgagor, if he be any.

tenant in the present case could not be damnified; for the mortgagor could never oblige him to pay over again the rent which had been levied by this distress. This remedy was a very proper additional advantage to mortgagees, to prevent collusion between the tenant and mortgagor.

Moss v. Gallimore more questioned (F).

But, on a motion (e) for sequestrators to pay rents to the mortgagee, which they had received from the tenants of the

(e) In Chancery, 5th July, 1786.

Moss v. Gallimore confirmed.

Mortgagee, on notice, entitled to all rent due and in arrear,

(F) The court of King's Bench however has since confirmed this case as to the point deduced from it in the marginal placita, ante, 173, n. (B). Mr. Justice Buller said he held the decision to be sound law, and stated that he was desired by Lord Mansfield to declare, that on consideration his Lordship was most perfectly satisfied with the determination in that case. *Birch v. White*, 1 T. R. 384. In that case notice of the mortgage to the tenant was compared to attornment, and it was argued at the bar for the plaintiff, that attornment when made related back to the time of the grant; but Co. Litt. 310 b. is contra; for there it is said, that attornment will not entitle the grantee to the rents which become due between the grant and attornment. The court, however, (in favor of the plaintiff's argument) appears to have been of opinion that the plaintiff was entitled to recover all the rent due at the time notice was given, and all the arrears of rent which remained in the hands of the tenant at that time; for that, after notice, the plaintiff must be considered as landlord from the date of the lease, and entitled to all the rents from that period, provided the tenant have not previously paid them over to his original lessor. And per Buller, J. this was settled in the case of *Watts v. Ognell*, Cro. Jac. 392, where it was agreed that the lessee was not bound to pay the rent without notice, and if he had paid it to his original lessor, it was a good excuse for him, and he might plead it; but if he had not paid it the action gave him notice to pay it to the grantee, and then he was chargeable for all that was not paid. This case (continued the learned Judge) shewed, 1st. How much the common law regarded and required notice where a person had not the means of knowing; for at that time there was no statute which required notice to be given. 2dly. It shewed where attornment was dispensed with or supplied by a statute, that the grantee had as complete and perfect a title as if attornment had actually been made. 3dly. It fortified an argument on which he relied much in the case of *Moss v. Gallimore*, drawn from the form of pleading, namely, that since the statute an attornment was never alleged either in a declaration, in covenant, or in an avowry, which could only be because it was supplied by the statute, and therefore unnecessary. And, 4thly. It proved that nothing could excuse the lessee from paying the rent to the assignee but actual payment to the original lessor without notice of the grant; and, if that were his case, he might plead it. In the case before the court the plaintiff was the landlord of the defendant. The landlord had a clear legal title

Mortgaged estate, his Honor, the Master of the Rolls, said, that the Court of King's Bench, he understood, now entertained

which he could support on pleading either in an action of covenant, or in avowry, and the tenant was answerable to his action, unless he could allege some legal bar in his defence, *which he could only do by shewing payment to the grantor before notice.*

Before we proceed to the next subject of the chapter, it may be useful to recapitulate the leading rules respecting the influence which the mortgage transaction has on leases for years, or, as they are generally termed, husbandry or occupation leases. It frequently, indeed generally, is the case, that the tenant takes his lease without inquiring into the landlord's power to grant it; esteeming questions on that head not only as querulous and presuming in the extreme, but as engendering a species of bad faith, which would certainly ensure the loss of his bargain. And though it be true, to use the words of Sir S. Romilly (*argo.* 11 Ves. 250), that no honest lessor would grant a lease without taking care that the lessee has the estate, yet there are landlords, who, through inadvertency or uncontrollable circumstances, would be ready to grant leases without considering any interest but their own. It afterwards proves that the estate is in mortgage, and subsequently the mortgagee gives the tenant notice of the incumbrance, and requires the rent to be paid to him, but, in the interim, the mortgagor (pushed, perhaps, to an extremity) has distrained while the tenant is meditating on the dilemma to which he is reduced. And although the principles on this head of law are clear and distinct, yet it generally happens in the end that the tenant's flocks and herds fall a prey to the urgent necessities of his indigent landlord. He may have taken a long lease at a moderate rent, and brought his farm into a flourishing condition, when he receives intelligence of a prior incumbrance, which may possibly be shortly followed with a notice to quit or a rise of rent by the mortgagee, thereby making his lease practically invalid. These considerations, therefore, render it highly essential in every individual taking a lease, to demand an inspection of the title of the intended lessor, if there be the least ground to suspect that the farm is in mortgage. See ante, 160. 1 Pres. Abs. 13. *Deverall v. Bolton*, 18 Ves. 505. *White v. Foljambe*, 11 Ves. 337. 3 Taunt. 433. 6 Ib. 64. *Filder v. Hooker*, 2 Meriv. 424. and *Purris v. Rayer*, 9 Price, 488, where it was expressly held, that on a contract for leasehold property, the vendor is bound to shew, to the satisfaction of the purchaser, that his lessor or the original grantor of the term was entitled to grant the lease. He cannot otherwise oblige the purchaser to complete his contract; and the circumstances of the lease having been originally granted by a lay-corporation, or of its being of very ancient date, do not alter the general rule. *Ibid.*

Lessee should inquire for his lessor's title.

We have seen, (ante, p. 174, n. 175, n.) that where the lands are let for years, or on a tenancy from year to year, and then mortgaged, the lease, or yearly tenancy, will protect the possession of the tenant against the mortgagee, who cannot by ejectment or any other means either turn him out of possession or increase the rent, but that on notice of the incumbrance the tenant must

What if lease be before or after mortgage.

pay the accruing rents to the mortgagee, as also all arrears accumulated from the date of his lease, for which (if the mortgagor could) the mortgagee may distrain or bring his action for use and occupation, though not in actual seisin of the premises at the time the rent or arrearage became due; et vide Woodf. 381, 2d edit.; and with respect to the lease no notice to quit will be necessary on the determination of the term; but as to the tenancy from year to year, the tenant will be entitled to six months notice to quit, either from the mortgagor or mortgagee, or his assignee. 1 T. R. 380. 580. and see Salk. 245. If, on the other hand, the mortgagee have acquired the priority, and the lease be made subsequently to the mortgage, without the mortgagee's concurrence, the mortgagee may recover in ejectment against the tenant, without giving him notice to quit, or notice of the incumbrance. 3 East; 451. With regard to the rents, the right to these will vest in the mortgagee, as well those in arrear as those which accrue afterwards. It is however observable, that the mortgagee cannot bring an ejectment against the lessee, nor, as it is presumed, distrain for the rent without he has the *legal* estate; and in all cases, after notice of the mortgage, it will be incumbent on the tenant, before he pays any future rents to the mortgagor, to have the sanction of the mortgagee to that payment to prevent the liability of his being called on for a second render. If the mortgagee refuses this sanction and demands the rent himself, it is apprehended that the tenant has no alternative but payment, though it might be implied from an observation of Mr. J. Burroughs, (2 Bing. 62), that the tenant may apply to the Court of Chancery to have the rent paid into court; but this would be putting the mortgagee to expence and depriving of rights which have been uniformly acknowledged. In discussing questions of this nature, it should be borne in mind that the lessee may redeem, and so prevent the consequences of eviction if the lease be made subsequently to the mortgage, Doug. 22; but if the lease be made prior to the mortgage, it is conceived that the tenant must take the consequences of distress, if he will not pay the rent to the mortgagee. It should also be remembered that certain acts on the part of the mortgagee will be construed into an approval and acceptance of the lease; such, for instance, as receipt or distress for rent, or encouragement given to the lessee to improve the premises. Ib. On eviction of the lessee, he will not be entitled to emblements, ante, 162. 1 T. R. 383. *Temple Ex parte*, 1 Glyn. & Jam. 218. It was in the latter case well put in argument, that "the mortgagee has a right to the estate at any moment he pleases, may bring ejectment at any time without notice, and is entitled to the estate as it is, with the growing crops: he has a right to all the rents which have become due since the mortgage, and which are unpaid," citing 1 T. R. 383. Et vide ante, 161, as to an action for mesne profits.

Of recovery of possession from mortgagor.

If the mortgagor be in possession he cannot be distrained upon, but only ejected. By the covenant usually introduced at the end of the mortgage deed, the mortgagor is lawful tenant till condition broken. After breach of the condition, he becomes tenant at will, paying no rent, if such a tenancy can exist. However, the mortgagee may consider him at any time as a tenant by sufferance, and evict him by ejectment as an ordinary tenant of that description; and a court of equity will not interpose its authority to obstruct the mortgagee in the exercise of this remedy. *Cholmondeley v. Clinton*, 2 Meriv. .

some doubts of the propriety of the decision of *Moss v. Gallimore*; that the principal upon which that case was decided was, that the right of the mortgagee would have furnished a good defence, if put on the record by way of justification under the mortgage term or conveyance. This reason, his Honor observed, had imposed upon him; but it was not considered that it might have been replied to the defence, that the mortgagor, till notice, was tenant at sufferance, if not tenant at will, to the mortgagee.

A mortgagee is not entitled to have an account against the mortgagor for the profits of the estate mortgaged, received and applied by him to his use (f). If a person take a mortgage

Mortgagor not accountable for rents; court will appoint receiver, but mortgagor not answerable for his losses.

(f) *Colman v. Duke of St. Albans*, 3 Ves. 25.

259. A notice to quit or demand of possession is not necessary to the success of this ejectment. *Keech v. Hall*, Doug. 22. Et ubi supra.

The mortgagee is entitled to the whole rents and profits, but as the receipt of the whole would, if more than the sum due to him for interest, make him a trustee for the residue, and of course accountable for deductions for land tax, and other out-goings, which he might be obliged to allow to the tenant, it is better that no more than the sum due to himself (if his object be only to obtain payment of the interest due to him) should be demanded. If, however, he finds his security to be scanty, his notice may be to pay him the whole of the rents, which, if more than the arrears of interest due, he will have a right to apply in part discharge of the principal. See a form of the notice adapted to each alternative in the Third Volume.

Of notice to pay rents.

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From the preceding observations it follows, that when a person has contracted for a lease, and the premises are in mortgage, both the mortgagor and mortgagee should join in the demise. The mortgagee should "demise, lease, and to farm let," and the mortgagor "grant, demise, lease, ratify, and confirm;" and the rent should be reserved to the mortgagee so long as the premises shall remain in mortgage; and to the mortgagor for the residue (if any) of the term. The whole legal estate is in the mortgagee, he therefore should be the leasing party. It is the more material to notice this, as it is common to make the mortgagor demise with the consent only of the mortgagee; but the simple assent of the mortgagee to the mortgagor's granting leases of the mortgaged premises, would be wholly inoperative for the purpose of transferring an interest to the lessee. Nor will a lease, even made by a mortgagee, (without the mortgagor) and before foreclosure, although he be in possession under the mortgage, be good; in equity, against the mortgagor, unless it be of necessity, and to avoid an apparent loss. See *Hungerford v. Clay*, 9 Mod. 1. S. C. post, 188; and see also Sel. Ca. Chan. 55. *Manlove v. Ball*, 2 Vern. 84. 1 Rose, Ca. Bank. 444, post, 186, note (N); and for a form of this kind of lease, see the Third Volume, tit. Lease, and the note there.

Mortgagor and mortgagee should join in granting leases.

title, the Court of Chancery will let him take possession of the estate, but will not make the party he leaves in possession account for the past rents. If the mortgagee has not the legal title to the mortgaged property, the Court of Chancery will appoint a receiver (g); but it can do no more. And the rule of equity is the same where the mortgagor has actually given the mortgagee a power to receive. If the mortgagee omits to use that power, he must impute it to himself if the profits are gone. The court will not make the mortgagor accountable. It would be against all rules of equity in the cases of mortgages to decree an account for the time when, by the connivance or permission of the mortgagee, the profits have been received and applied as the mortgagor might think fit.

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Bill for discovery of mortgage of leaseholds dismissed.

In the case of *Sparkes v. Smith* (g), the court refused, on bill, to compel an assignee of a term on mortgage to discover his assignment; the object of the lessor in requiring it, being to make him liable to the covenants of the mortgagor, although he had not taken actual possession of the premises.

Mortgagee of leasehold property liable to pay rent, and repair, if he take assignment of whole term, instead of under-lease;

This was a mortgage of houses held upon leases for seven years, with covenants, that the lessee should repair, defeazable upon payment of the money lent and interest. The houses being greatly out of repair, the original lessor filed a bill to discover, whether the lease was not assigned to the mortgagee, and to compel him to perform the covenants on the lessee's part. The defendant, by answer, insisted he never was in possession, nor had received any of the rents, except a small sum by an order from the mortgagor to one of the tenants, which was paid him in part of what was due on the mortgage, and not as rent. And the court thought it was the mortgagee's folly to take an assignment of the whole term, whereby he subjected himself to the covenants in the original lease, instead of taking a derivative lease of all the term but a month, or week, or day, as he might have done, yet, as he was only a mort-

(g) 2 Vern. 276. [Text confirmed, post, 182, 3, in notis.—Ed.]

(G) See more on the appointment, power, and office of Receiver, *infra*, 294, et seq. in notis.

gagee, and never in possession, would not assist the plaintiff to charge him to perform the covenants *in specie*; but left the plaintiff to recover at law as well as he could, and dismissed the bill.

But, in a subsequent case (k), where one hundred pounds were lent by way of mortgage upon an assignment of a building lease, and the mortgagee never entered nor took possession, but lost the money lent; the defendant in equity having recovered against the mortgagee, as assignee, the rent reserved on the lease, the bill was to be relieved against the recovery at law; and the court dismissed it; saying, the mortgagee was ill advised to take an assignment of the whole term (G 2).

and that though he lose his money, or never enter.

Upon an accurate investigation of the reasons upon which the decisions in the two preceding cases were founded, they will appear perfectly reconcileable; in both, *the principle of law, that an assignee of a whole term is subject to the covenants in the original lease*, is fully admitted. The different events of the applications, therefore, did not arise from a contrariety of opinions as to the legal operation of such an assignment, but arose from the parties having changed sides on the applications to the court (H). In the former case the lessor was plaintiff, and being unable to make out his case at law,

Preceding cases reconciled.

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(k) *Pilkington v. Shaller et al.*, 2 Vern. 374.

(G 2) So in an anonymous case, 2 Freem. 253, a mortgagee of a building lease, (the lessee having died insolvent,) was decreed to build on the ground, and not to quit the lease, though content to lose his money. It is a general rule, that the assignee of a lease, whereby the lessee covenanted for himself and his assigns, absolutely to repair premises, without qualification, is bound to repair and rebuild, notwithstanding they are destroyed by fire. *Bullock v. Dommitt*, 2 Chit. Rep. 608. At first sight it seems anomalous that the word "repair," should be construed to mean "rebuild," but such has been determined by a host of authorities. See *Walton v. Waterhouse*, 2 Saund. 422, n. (2). *Paradine v. Jane*, Aleyn, 27. Sty. 47. 162. *Poole v. Archer*, 2 Show. 401. Skin. 210. *Pym v. Blackburn*, 3 Ves. 34. *Chesterfield v. Bolton*, Com. 627, and particularly *Bullock v. Dommitt*, 6 T. R. 650.

(H) This argument was adopted by Lord Chief Justice Dallas, in the Exchequer Chamber, in the case of *Williams v. Bosanquet*, cited post, 184, *in notis*.

without the help of equity, applied for its aid to enforce a rigorous and hard demand, founded in strict law; the court, in this case, as it does in all others, when it is called upon to use a discretionary power, took into its consideration the relative situation of the parties; and the plaintiff's claim being unconscionable, elected to remain passive, and leave the parties, as they stood at law; but, in the latter case, the assignee was plaintiff against the lessor; so that he, and not the lessor, sought the aid of equity, after the latter had obtained a judgment at law upon the covenants; in which case, there appears to me to have been no ground for their interference, unless fraud or mistake had been suggested; for the original lessor, having a right at law to the benefit of the covenants in his lease, equity in that case must follow the law. And when cases are attended with hardship, leaving the parties to such remedy only as they are entitled to at law, is not uncommon in a court of equity. Thus, if a bill be brought by a remote heir against the next of kin, for a discovery of a title, and evidence, and to have terms removed and the title at law cleared; this being a hard case, equity will not assist; for, as it would not relieve the children, should the remote heir recover, so neither will it assist the remote heir.

Mortgagee (assignee of whole term) not liable to covenants in lease, unless in possession. See vide post, 181, 182.

However, upon reconsideration of this question, in the case of *Eaton v. Jacques* (i), which arose upon a case reserved at the Sittings for Middlesex, before Buller, Justice, it was determined, that a mortgagee, assignee of a term for years, should not be liable to the covenants in the lease, unless he had taken actual possession. The circumstances set forth in

(i) *Eaton v. Jacques* (I), Dong. Rep. 438. [455, 4th edition.—Ed.]

Eaton v. Jacques over-ruled.

(I) Over-ruled by overwhelming authority. In *Stone v. Evans*, Woodf. L. & T. c. 3. s. 15. when this case was cited, Lord Kenyon said, he would over-rule it without the least reluctance; and in *Westerdell v. Dale*, 7 T. R. 312, his Lordship had not changed his opinion. In *Williams v. Bosanquet*, 1 Brod. & Bing. 264, Lord Chief Justice Dallas said, he had collected the opinion of the Judges on the point, and he had authority to say, that in the opinion of a great majority, this case of *Eaton v. Jacques* was not to be considered as having been rightly decided. It is met by the maxim, *Qui sentit commodum debet et onus sentire*.

Mortgage
of
leaseholds.

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this case were (*k*), that on the 1st of December, 1775, the plaintiff demised the tenements in question to Denys; that, on the 21st of June, 1777, by indenture, made between Denys, of the one part, and the defendant of the other part, after reciting the lease, Denys (for the considerations therein mentioned) bargained, sold, assigned, transferred, and set over unto the defendant, his executors, administrators, and assigns, the premises demised by the lease, and all the estate, right, title, interest, benefit of renewal, term of years, and time to come and unexpired, property, profit, claim, and demand whatsoever, of Denys, in the same, by virtue of the lease or otherwise howsoever, to hold unto the defendant for all the residue of the term of twenty-one years by the said lease demised, and subject nevertheless to the rents and covenants therein contained, and which were on *the tenant's part* to be paid, kept, and performed: in which indenture was contained a proviso for making the same void on payment of one hundred and fourteen pounds and interest at *five per cent. per annum*; and there was another proviso and agreement between the parties, that until default should be made in payment of the one hundred and fourteen pounds, and interest, contrary to the intent of the said proviso, it should be lawful for Denys, his executors, administrators, or assigns, to hold and enjoy the premises without interruption from the defendant; that the interest which became due on the mortgage was regularly paid up to, and on, the 21st day of December, 1778; and that the defendant never had possession of the houses under the mortgage. The question submitted to the court was, whether the plaintiff was entitled to recover the rent which became due at Christmas, 1779, from the defendant? And Lord Mansfield said, that, in point of fact, this case must have existed for a century past in a thousand instances. In this great town particularly, building leases had been and were perpetually mortgaging; and yet no instance had been found, where the ground landlord had attempted to charge the mortgagee, not in possession, with the rent or covenants. This was a strong argument against the plaintiff especially where the case was so hard, so unjust, and unconscionable. Numberless

(*k*) *Eaton v. Jacques*, Doug. 438. [455, 4th edit.—Ed.]

*Mortgage
of
leaseholds.*

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*Reservation of
a day out of
term saves
mortgagee (k).*

inconveniences would arise if such a demand could be supported. The mortgagee never asked whether the rent was paid; he only looked to his security, and, when the principal and interest were paid, he re-assigned. But, if the plaintiff was right, a mortgagee might be called upon, years after such re-assignment, for arrears or breaches of covenant during the assignment; the consequences would be terrible; and all this arose from a mere slip in the attorney in making the conveyance; for if he had made it an under-lease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee (l). Though no cases had been cited at the bar which applied to the present question the court had found two in Vernon, which he would state, that it might not be supposed, after this judgment, they had been overlooked. His Lordship stated the cases of *Sparkes v. Smith* and *Pilkington v. Shaller* (m), and said, the latter could not be supported; for the court there refused to relieve the mortgagee, because it was his own fault to take an assignment of the whole term, and not an under-lease; but that was a very common ground of relief in equity. These cases, therefore, left the question as it stood upon the argument at the bar; and, there being no solemn well-considered decision, the court might resort to the principles. In leases, the lessee, being a party to the original contract, continued always liable notwithstanding any assignment; the assignee was only liable with respect to his possession of the thing. He bore the burthen while he enjoyed the benefit, and no longer: and if the whole was not passed, if a day only was reserved, he was not liable. To do justice between men, it was necessary to understand things as they really were, and construe instruments according to the intent of the parties. What was the effect of this instrument between the parties? The lessor was a stranger to it; he should not be injured, but he was not entitled to any benefit under it. Could they shut their eyes and say it was an absolute conveyance? It was a mere security; and it was

(l) *Holford v. Hatch*, Doug. 174.

(m) *Supra*, 178.

(K) For a landlord cannot maintain an action of covenant for rent against an under-lessee. 1 Doug. 183. Serj. Frere's edition.

not, nor ever was meant that possession should be taken until default of payment, and the payment, and the money had been demanded. The legal forfeiture had only accrued six months, and, if the mortgagee had wanted possession, he could not have entered *viâ facti*. He must have brought an ejectment. This was the understanding of the parties, and was not contrary to any rule of law. It was not an assignment of all the mortgagor's estate, right, title, &c. Willes, Ashhurst, and Buller, Justices, were of the same opinion.

And in a subsequent case of *Walker v. Reeves* (n), M. 22 Geo. 3. this doctrine was confirmed as to mortgages, and a distinction taken between the case of an assignment *by way of mortgage*, and unconditional assignments (L). Last case confirmed.

But the authority of the cases of *Eaton v. Jacques*, and *Walker v. Reeves*, has since been doubted, and denied to be [182]
Two last cases over-ruled.

(n) Doug. Rep. 461, note (1).

(L) " This case has been materially impeached by *Turner v. Richardson*, 7 East, 335." Per Bayley, J. 1 Brod. & Bing. 245, referring to *Copeland v. Stevens*, 1 Barn. & Ald. 593. But these cases of *Turner v. Richardson*, and *Copeland v. Stevens*, appear to have been decided on a different point. In the latter it was held, that the general assignment of a bankrupt's personal estate, under his commission, did not vest a term of years in the assignees unless they had done some act to manifest their assent, till which time the term remained in the bankrupt, and he was liable to the payment of rent accruing subsequently to the bankruptcy; and, in the former case, it was said, that if the assignees had put the estate up to auction, this would not have been a manifestation of their assent to take the lease, for they may have done so merely for an experiment, and to see whether it was worth having. Neither does it appear that possession taken generally would amount to acceptance of the lease; but if the assignees are in possession, and suspend their election, it has been determined that they are in equity liable to pay the rent accruing due during the time they retained possession. *Duck Ex parte*, 2 Madd. 315. In the case of actual acceptance (which may be done without entry), the assignees will of course be liable to the covenants for payment of rent, &c. and cannot afterwards renounce although it turns out a bad bargain; but if they do not take, they will not be liable notwithstanding the assignment. See on this subject, 49 Geo. 3. c. 121. *Hanson v. Stevenson*, 1 Barn. & Ald. 303. *Thomas v. Ketteridge*, 7 Taunt. 206. *Taylor v. Young*, 3 Barn. & Ald. 521, Cooke B. L. 204. 8th edit,

Walker v. Reeves impeached.

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Of assignees acceptance of lease in bankruptcy.

law (*o*). And the case of *Lucas v. Camerford* (*p*) seems to support a directly opposite doctrine to that which was the basis of the decision in these cases, viz, that the assignee was only liable in respect of actual possession.

Equitable mortgages liable to rebuild; for court will decree actual assignment of whole term (L 2).

The latter case arose on a bill by the executors of lessor against the depositary of a lease, to secure to him a debt, for specific performance of a covenant in the lease to rebuild houses upon the premises in the eleventh year of the term, which was a term, of seventy-one years, to be held for the first ten years at a pecuniary rent; for the eleventh year at a pepper-corn rent; and for the rest of the term at a pecuniary rent. The defendant, by his answer, stated the fact of the disposal, by way of mortgage, and insisted that, having no title but as mortgagee, he was not bound to rebuild. Lord Thurlow (Chan.) thought there could not be a decree to rebuild, as he could no more undertake the conduct of a rebuilding, than of a repair. But his Lordship said, it was no matter whether the defendant took it as a pledge or as a purchase, he could not take the estate as a security, and refuse the burden that was upon it, which having once taken he could not abandon: that being then only an assignee in equity, no action could be brought, and that the only relief he could give the plaintiff, as he could not give him damages, was to put him in a situation to recover them; his Lordship therefore decreed, that the defendants should take an assignment of the lease, and execute a counterpart, and that he must pay the costs (*M*).

(*o*) The author has understood that the present Chief Justice of the court of King's Bench denied the law of the case of *Eaton v. Jacques* twice in the

Sittings after Trinity Term, 1796.

(*p*) 1 Ves. jun. 235. 3 Bro. Rep. Cha. 166. et vide *City of London v. Nash*, 1 Ves. 13. 3 Atk. 512.

(L 2) But if he have only the deeds without any exact lien upon them, a doctrine alluded to p. 1051, *infra*, it is presumed that he would not incur this liability, except indeed he refuse to deliver up the deeds on demand.

Whether mortgagee liable to covenants.

(*M*) On this subject there are some future and a few prior decisions to be noticed. The point for consideration is, whether a mortgagee, having an assignment of the whole leasehold term by way of mortgage, and not being in possession of the estate, shall, as assignee of the term, be liable to the covenant for payment of rent, and other covenants which may be reserved in the

But it is clear, that if the mortgagee enters into possession, he becomes liable to all covenants that run with the land, *If mortgagee enters, he becomes subject to covenants.*

original lease, to be paid, observed, and performed by the lessee, his heirs and assigns? If a portion of the term merely be assigned to the mortgagee, or if he enter into the possession of the premises, in both these instances the law, it seems, is clear. In the former case, he will not be liable to the covenants; but, in the latter case, he will. (See next paragraph of the text.)

The reasons which, from time to time, have been adduced for determining the proposed question in the negative have consisted chiefly of these considerations:—that the assignment was a mere security, and not intended by the parties to impose a burthen on the mortgagee; that all the estate, right, title, interest, &c. of the mortgagor was not legally vested in the mortgagee; that there were material distinctions between legal possession and actual possession, and between assignees in law and assignees in fact; that the mortgagee could not be said to have any actual estate till entry; that in pleading it was necessary to state that the mortgagee entered, and was possessed; that the statute did not transfer the use into possession, there being no estate of freehold to serve the use, and therefore that it was a case to be considered wholly at common law; that at common law an estate could only be perfected by possession; that a lease for years laid in livery not in grant; that a bare lease gave an *interesse termini* only, the lessee not being complete tenant till entry; that there was neither privity of estate, nor privity of contract between the original lessor and the assignee till possession taken; and that the parties never meant that possession should be taken until default in payment, and the money had been demanded. But these arguments were far from convincing, and appear to have had little weight with the court. The question was frequently discussed in Westminster Hall, but not being the exact point in dispute, it uniformly eluded a final determination. The courts however evinced a disposition to treat the case of *Eaton v. Jacques* as a case *sui generis*, and to fix the conditional assignee with all the covenants of the mortgagor. *Reasons in his favor.*

In the case of *Jackson v. Vernon*, 1 H. Bl. 114. (citing *Eaton v. Jacques*) the principal object of inquiry was, whether under the conveyances the grantee was absolute owner of the ship or mortgagee only? And it was decided, that he was the latter; and as such that he was not liable for necessaries provided for the ship before he took possession. *S. L. Twentymen v. Hart*, 1 Stark. 336. On the principal case it is observable, that the Judges did not appear to have been aware that the authority of *Eaton v. Jacques* (a case which had considerable weight in their determination) had been impeached. It is also worth noticing, that the principal case related to the provision of consumable articles for the ship's company, and not to repairs of the ship itself. But in *Westerdell v. Dale*, 7 T. R. 306, this latter point came directly in dispute, and the question there was, whether the mortgagee of a ship out of possession was liable for repairs? Lord Kenyon, C. J. remarked, that whether in or out of possession the mortgagee was the legal owner, and was always so considered in a court of law, notwithstanding his title might be subject to equitable interests. It had been contended at the bar (said his *Mortgagee not liable to provide ship with necessaries before possession, but he must repair.*

for he takes it *cum onere*, and, enjoying the profits, he must submit to losses (*q*).

(*q*) *Traherne et al.' v. Sadlier et al.* 1 Bro. Par. Ca. 105.

Lordship) that a mortgagee was only liable when in possession, and what proved that point was, that in charging the mortgagee it was necessary to state in pleading that he entered and was possessed. But with great deference to the learned Judge who gave that reason, his Lordship said he doubted it; for that he considered those as merely formal words. It was not however necessary for him then to decide these points, and he declined giving any positive opinion upon them; but as several cases had been cited, he thought it right to throw out these doubts, lest, whenever the question should arise again, it might otherwise be supposed that he had acquiesced in these determinations. See also Dow. & Ry. N. P. C. 56. where the doubt is considered by Abbott, C. J. to be well founded.

*Acceptance
equal to entry.*

[184*]

*Liabilities ac-
crue by assign-
ment of whole
interest.*

That the mortgagee will not be liable to the covenants of the original lease until he has actually entered into possession of the premises, because in pleading it is necessary to declare that he entered, and was possessed, is an argument which turns in a circle, thus:—Entry and possession are necessary because the declaration so alleges, and because they are necessary the declaration does so allege; and it is open to remark, that the form of pleading in *Cook v. Harris*, 1 Ld. Raym. 367, is material to shew that *if there be an acceptance of the assignment, it will be equivalent to an actual entry.*

The case of *Stone v. Evans*, Woodf. L. & T. c. 3. s. 15. was decided on the same principle as *Westerdell v. Dale*, ubi supra. Gibbs, then of counsel in the cause, there offered proof that no possession was taken; but Lord Kenyon said, *whether possession was taken or not made no difference.* And when Gibbs cited *Eaton v. Jacques*, his Lordship said, he would over-rule it without the least reluctance; and by another note of the same case his Lordship is reported to have said, *by assignment of the whole estate all liabilities accrue, and persons who act with caution always take a mortgage for a term one day short of the original lease.* 1 Brod. & Bing. 246.

*Devisee of Eq.
of R. not liable
to covenants as
assignee of
whole term.*

In *Carlisle v. Blamire*, 8 East, 487, it was held, that the devisee of the equity of redemption (the legal fee being in a mortgagee) was not liable in covenant as assignee of all the *estate, right, title, and interest*, of the original covenantor; Lord Ellenborough observing, that it was not necessary on that occasion to impugn or confirm the doctrine laid down in the case of *Eaton v. Jacques*, Doug. 455; for whether a mortgagee, who had not entered, were or were not liable to an action of covenant as assignee, it was quite clear that the devisees of an *equitable* estate were not so.

*Demand of rent
equal to actual
entry; and suf-
ficient to render
mortgagee lia-
ble to covenants.*

The question was again alluded to in the court of Common Pleas in the case of *Gretton v. Diggles*, 4 Tannt. 766; but the point was again evaded, and the case determined on another ground, namely, on evidence of actual possession. The evidence consisted of the testimony of the tenants who occupied the premises, and one in particular proved the defendant (a trustee for an annuitant) to have said, “you must pay the rent to me, I am become landlord for my client who has the annuity, and you must pay the ground-rents to me.” This

And if a mortgagor, by a mortgage of a term vested in him, divests himself of all interest therein, in the consideration of a *Lease by mortgagor and mortgagee in*

was considered to be not only an admission by the defendant that he was assignee, but also an act which, under the circumstances, was equivalent to an entry on the land; for he could not have taken actual possession because of the lease. He told the tenant that he was the landlord, which was a claim of title, and this, coupled with the assignment and grant, was sufficient to make him landlord of the premises, and therefore liable in covenant to the lessor as assignee for non-payment of rent, and not repairing; and such was the judgment of the court.

Since these adjudications the question under consideration does not appear to have occupied the attention of the court till the late case of *Williams v. Bosanquet*, 1 Brod. & Bing. 238. 3 J. B. Moore, 100, where, upon solemn argument at Serjeant's Inn, on a question reserved for the opinion of the twelve Judges (ten of whom were present), it was at length finally decided, that where a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest will be transferred to him, and he will become liable on the covenant for payment of rent, although he may not have occupied or become possessed in fact. The ground of this determination assumed the shape and authority of a syllogism, and was to the following effect:—1°. Actual possession is not necessary to render the *lessee* liable under the lease to the payment of rent, that being due by the lease or contract, and not by the occupation. 2°. The *assignee* of the lessee stands exactly in the same situation as the lessee after condition broken, he having accepted of an assignment of the *whole interest* of the lease. Et 3°. ergo, The assignee will be liable to the covenants in the original lease before or without any actual entry or occupation.

Mortgagee of whole term liable to covenants in original lease before entry.

In support of the first term of the argument, the text of Littleton and the commentary of Lord Coke was referred to (Litt. s. 58. p. 43 b. Co. Litt. 46 b.), in which latter place it is said, "It is to be understood that in a lease for years by deed, or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease." And in Littleton, s. 66. this was still further explained, it being there said, "Also if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the form of the lease, and the reason (says Lord Coke) is because the interest of the term doth pass, and vest in the lessee before entry; and therefore the death of the lessor cannot divest that which was vested before." And so in *Bellasis v. Burbrick*, 1 Ld. Raym. 171. S. C. 1 Salk. 209. 1 Lutw. 74. it was laid down that "in case of leases for years, the rent becomes due by the lease, and not from the entry, and there is no need to aver occupation, because the lessee is liable to pay the rent whether he occupies or not." With respect to the middle term of the syllogism (which is always by far the most important one) it was observed that the assignment of the lease in question

Arguments for this decision.

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which covenants
are with mort-
gagor only; as-

court of law, he retains only the equity of redemption, which he must pursue in a court of equity; and therefore, if he join

was of all the right, title, and interest of the assignor in the lease assigned. The whole interest, therefore, passed from the lessee to the assignee, and that so completely that there was a covenant for re-assignment on the re-payment of the money. It vested then absolutely till such re-assignment, and this assignment was not rendered less absolute, because by agreement between the immediate parties (to which the lessor was not privy) it was stipulated that the assignor should be at liberty in a given event, which might or might not happen, to entitle himself to a re-conveyance by re-payment of the money borrowed; for in the intermediate time, or till such re-assignment took place, the assignee stood in the situation of the assignor, and was as against the lessor subject to all the liabilities created by the lease; and if one were liable without entry and possession, the other would be equally so, and that the former would be liable was fully shewn. But in the case in question there could not be any doubt whatever; for the special verdict found that the money was not paid on or before the day, when, if not paid, the assignment was to become absolute: it did therefore become absolute, so that this was strictly the case of an absolute assignment, and subject therefore to all the rules which affected it as such. The acceptance of the assignment was the acceptance of the thing assigned, and this constituted a legal though not an actual possession; which engendered a privity of estate; and as to a privity of contract there was such privity also; for the contract of the lessor was with the lessee and his assigns, and the mortgagee was the assign of the lessee. It was therefore a contract between the original lessor and the mortgagee; and, lastly, in support of the conclusion, the case of *Cook v. Harris*, 1 Ld. Raym. 367, was cited, where it was laid down by Lord Holt, C. J. "that the assignee has the estate in him before entry, though not to bring trespass," that being an action founded on possession.

Observations
on last case.

On this case it is observable, that it seemed to turn considerably on the circumstance of there being a covenant for the re-assignment of the premises on repayment of the money; but it is apprehended that the same decision would have been given, if, instead of a covenant, there had been a proviso to vacate the estate of the mortgagee on repayment of the money lent; for the legal estate in the term would in that case have become equally absolute in the mortgagee on the breach of the condition as in the other. It may also be useful to apprise the student, that this case arose on an action of covenant for the non-payment of rent, and not for the non-performance of a covenant to repair; but the principles advanced in it are, it is conceived, as much applicable to the one species of covenant as to the other.

Caution to
mortgagee to
take under-lease
instead of as-
signment, and
indemnity
against rent.

This decision renders it imperatively incumbent on the mortgagee to take an under-lease for his security, instead of an assignment of the whole term. By this means the legal privity between the mortgagee and the landlord will be destroyed, Doug. 174; and the former not liable to the covenants in the original lease until entry. Ante, 181, *in notis*. But the under-lessee cannot avoid the landlord's distress for rent in arrear, nor will he, paying such rent, be able to recover over against the mortgagor, unless an express covenant be introduced on the part of the latter, indemnifying the mortgagee from such casual and

with his mortgagee in a lease, in which the lessee is made to covenant with the mortgagor, for rent, repairs, &c. such covenants will be merely collateral to the mortgagee's interest in the land, and the assignee of the mortgagee cannot maintain an action for the breach of them on the statute of 32 H. 8. c. 34. Thus, where S. and W. (r), described therein to be mortgagees of the estates in question, for a term of ninety-nine years, demised them to R. for eleven years, at a yearly rent, payable to S. or his assigns; in which was contained covenants on the part of R., with S. and his assigns, *inter alia*, to pay the rent and to keep the premises in repair; it was held, on an action of covenant, brought by the devisee of the mortgagee, the

assignee of mortgagee cannot maintain action for breach of these covenants (N).

(r) *Webb v. Russell*, 3 T. R. 393.

coerced payment of the rents; for the parties having entered into an express contract by the under-lease, which contains no covenant of indemnity, an implied promise to that effect is excluded. If the under-lessee be interrupted in the quiet enjoyment of the premises, an action of covenant will lie on the demise. Com. Dig. tit. Covenant (A 4). *Schlenck v. Moxey*, 3 Barn. & Cress. 791. As to what will be considered an under-lease, the reservation of a month, a week, or even a day to the assignor, will be sufficient to save the mortgagee. But the old practice of reserving rent merely, or a right of entry to the assignor, is very reprehensible. Indeed, it is now settled, that though the instrument import to be a lease at a reserved rent from the lessee to the mortgagee, yet if in effect it comprize all the estate which resides in the lessee, it will amount to an assignment, and not to a lease or an under-lease. See *Palmer v. Edwards*, Dong. 187, in *notis*; and further, *Goddard v. Keate*, 1 Vern. 87. *Neale v. Wyllie*, 3 Barn. & Cress. 533. 1 Fonbl. Tr. Eq. 357. Sheph. Touch. 211. Woodf. L. & T. 357, 358. Also in the Third Volume, where several forms of mortgages of leasehold property will be found.

(N) Because they are collateral to the mortgagor's interest (he having the equitable and not the legal estate), and do not run with the land; and if during the continuance of the derivative lease, the mortgagor and mortgagee were to assign the whole of their estates and interests in the original term to A., who afterwards were to take a conveyance of the fee to himself and his heirs, whereby the reversionary interest in the original term expectant on the derivative lease would become merged, the covenants incident to that reversionary interest will be extinguished; but the mortgagor may, notwithstanding these circumstances, maintain an action on the breach of the covenants against the lessee; for, as to the mortgagor the covenants were in gross, and not concurrent with the original term. *Stokes v. Russell*, 3 T. R. 678. See also 1 T. R. 90; and 1 Esp. N. P. 463. Hence therefore the covenant for the payment of the rent should be with the mortgagee alone, unless the mortgagor have a power to lease granted or reserved to him by the mortgage deed. See ante, 177, and a form in the Third Volume.

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In occupation leases, covenants should not be entered into with mortgagor.

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declaration in which set forth two breaches of covenant, the one for non-payment of rent, and the other for not keeping the premises in repair, that the action could not be maintained. Lord Kenyon, in delivering the opinion of the court, observed, it was well settled at common law, without referring to the statute 32 H. 8. c. 34, that covenants, which run with the land, will pass to the person to *whom the land descends*. And that statute enacted, for the benefit of the *grantees* of reversions, that they should have the like advantages against the lessees, their executors, &c. by entry for non-payment of the rent; and should have, and enjoy, all and every such advantages, benefits, and remedies, by action only, for not performing other conditions, covenants, and agreements, contained in the leases, against the lessees, as the lessors or grantors had. The statute also contained a clause, giving the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. Therefore, under this statute, the grantees or assignees stood in the same situation, and had the same remedy against their lessees, as the heir at law of individuals, or the successors (in the case of corporations) had before the statute. It became therefore necessary to inquire whether this action of covenant could have been maintained by the heir of the person, from whom the plaintiff derived her title. It was stated, that S. was only a mortgagor, who had parted with his whole term to the mortgagee; and the declaration went on to state, that the whole interest which was vested in him, he had transferred to the mortgagee. Therefore, in point of law, his Lordship could not conceive how this covenant made with S. could be said to run with the land; for S. was stated in the declaration to have no interest whatever in the land, and yet both the implied covenant, arising from the "yielding and paying," and also the express covenants, were entered into with S. It was not sufficient that a covenant was concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here S. had no interest in the

To make a covenant run with land, there must be privity of estate between covenanting parties (o).

Covenants *currente anno*.

(O) As to the distinction between covenants *currente anno* and covenants in gross, see 2 Tho. Co. Litt. 328. Sugd. V. & P. 477. 481, 5th edit. 4 Cru. Dig. 480, 2d edit. Fearn's Posth. Wo. 113. *Dare v. Tucker*, 6 Ves. 460.

land, of which a court of law could take notice, though he had an equity of redemption, an interest, of which a court of equity would take notice. These, therefore, were collateral covenants. And though a party might covenant with a stranger to pay a certain rent, in consideration of a benefit to be derived under a third person, yet such a covenant could not run with the land.

But it is a necessary conclusion, from the resolution in the last-mentioned case, that such covenants not being made with

Covenant with one not having legal estate, is a covenant in gross,

Berry v. Young, 2 Esp. N. P. C. 640. *Boughton v. Jewell*, 15 Ves. 176. *Roach v. Wadham*, 6 East, 289. *Mor. & Co. W. Elem.* 87, 88. *Twynam v. Prickard*, 2 Barn. & Ald. 111. *Stuart Ex parte*, 2 Rose, B. C. 215. A covenant for fire insurance runs with the land, 5 Barn. & Ald. 1. But it is observable, that the assignee of a lease is not liable to the original lessor for a breach of covenant not running with the land, unless he be expressly named in the lease under the term "assigns." *Grey v. Culbertson*, 2 Chit. Rep. 482. The implied covenant to pay rent resulting from the reddendum, is a covenant running with the land, and consequently the assignee of the lessor may take advantage of it. *Vytvan v. Arthur*, 1 Barn. & Cress. 410. But a covenant for payment of the mortgage money, is not a covenant running with the land. *Canham v. Rust*, 2 J. B. Moore, 172. *S. C.* 8 Taunt. 227. 1 Selw. N. P. 485, 5th edit.

In *Barclay v. Raine*, 1 Sim. & Stu. 449, it was held, that a purchaser is not bound to complete his purchase without the title deeds, unless he has a legal covenant to produce them; and that a covenant to produce title deeds runs with the land for the benefit of purchasers, but not for the benefit of vendors. In this case it was made a question, where one was in possession of title deeds relating to his own lands as well as to the lands of another person, who had no covenant for the production of the title deeds, whether such other person had a general right in equity to compel the production of the deeds. His Honour, the V. C. seemed to consider such right as highly questionable. *Ib.* 455. But *quære*, if a person possessing deeds relating to other property than his own is not in all cases bound to produce the deeds to that other person, if the latter do not dispute his title? *Et vide infra*, 633.

Of covenant to produce deeds.

The most effective way of fixing a restrictive covenant on land, is by way of condition. Suppose A. conveys to B. a piece of land, on which it is intended to build, and A. is desirous of preventing B. from erecting any edifice within a certain extent of his boundary; this object may be obtained by a conveyance to B., on condition that such conveyance shall be void on B.'s transgressing the terms of the condition. The same observation may be applied to the assignment of part of leasehold premises, where it is intended to free them from rent. The part retained should be conveyed to the assignee, who should re-convey them to the vendor, on condition of re-entry, if the assignee be called on for any part of the reserved rent.

the person who has the *legal* estate, do not run with the land, and that the assignee of the mortgagee cannot maintain an action on the covenants, that these must be considered as *covenants in gross*, and that of course the mortgagor may maintain an action upon them. And so it was determined on the same instruments, and between some of the same parties in the case of *Stokes v. Russell*, in the court of King's Bench (s).

After ejection,
and possession
taken, and, un-
til foreclosure,
mortgagee has
but a chattel;

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But although the money be not paid at the day, and the mortgagee brings his ejection, and enters into possession, yet, until after foreclosure, in consideration of a court of equity, and notwithstanding the form, the mortgagee is considered as having but a chattel, and the mortgage is only a security; the mortgagor is the real owner (t).

Mortgagee in
possession can-
not lease, to
bind mortgagor,
except in cases
of necessity.

It follows, of course, from this view of the transaction, that the mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor. He can make no lease of the lands for years to an under-tenant. Thus, in the case of *Hungerford v. Clay* (u), the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved, with a covenant, that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for four years longer; that, if the plaintiff would grant such lease, the defendant would re-convey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancellor, his Lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease the premises for years to bind the mortgagor, unless to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

Reasons for last
case.

Indeed, if it were otherwise, it would be in the power of the mortgagee effectually to bar the mortgagor the benefit of

(s) 3 T. R. 678. [Affirmed in the Exchequer Chamber, 1 H. Bl. 572.—Ed.]

(t) Doug. Rep. 610. [Et vide ante, 165.—Ed.]

(u) 9 Mod. Ca. Eq. 1. 2 Eq. Ca. 601.

redemption at his pleasure, by granting beneficial leases on fines; besides, if such leases were held good, it would be difficult for the mortgagor to recover any rent, though the principal and interest should be paid; as, not claiming under the estate of the mortgagee, he cannot have any benefit of the lease made by him; for he is neither party to the deed, nor privy to the estate.

And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to re-convey the premises free from all incumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law, a mortgagee in fee may commit waste, yet he will be restrained in equity. Thus, on a bill to redeem a mortgage (x), wherein an account was decreed, and 240% reported due, and exceptions taken to the report; it being, on motion and reading affidavits, shewn, that the defendant had burnt some of the wainscot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

Waste not justifiable by mortgagee before foreclosure.

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So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was

Mortgagee cannot cut timber (P), unless his security be scanty or defective (P 2).

(x) *Hanson v. Derby*, 2 Vern. 392.

(P) Nor open mines or pits for gravel, peat, coal, &c. Co. Litt. 53 b. 54 b. 5 Co. 12. (but he may work old ones, *Clavering v. Clavering*, 2 Pr. Wms. 388.) nor change the course of husbandry, 1 Cru. Dig. 133, 4th edit.; nor destroy heir-looms. 1 Inst. 53 a. 2 Ib. 304.

(P 2) In *Hippesley v. Spencer*, an injunction was applied for, on behalf of a mortgagee, to restrain the mortgagor from cutting down timber. The Vice-Chancellor referred to a case of *Sewell v. Pemby*, in which, upon communication with the Lord Chancellor, and with his approbation, he had stated that he would not grant such an injunction upon the application of the mortgagee, unless it was made to appear that the security would be insufficient or scanty without timber. The motion stood over for such an affidavit. 5 Madd. 422. See also on the subject of felling timber on the mortgaged property, *Fairfield v. Weston*, 2 Sim. & Stu. 96.

where the security is defective (*y*); for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

Mortgagee may convert expences for necessary repairs into principal (q).

However, although the mortgagee cannot, to better his security, do any act to encumber the estate mortgaged (*z*), which will be valid against the mortgagor after redemption, nor will be justified in committing waste; yet he will be entitled to such expences as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

If no covenant, mortgagor not compellable to renew, but mortgagee may, and add fines to principal.

Thus if a leasehold estate be mortgaged (*a*), and there is no covenant on the part of the mortgagor, that he shall procure the lives to be filled up, the mortgagee cannot compel him to do it: but must pay the expence of renewing, and reimburse himself by adding to the principal of the mortgage, and it shall carry interest. So it was determined, in the case of *Manlove v. Bale* (*b*), which was a mortgage of a church lease for three lives, two of which died during the time the estate was in mortgage, and were renewed on fines paid by the mortgagee.

Mortgages entitled to benefit of attendant terms, though fraudulently concealed.

A term assigned in trust to attend the inheritance will, in equity (*c*), follow all the *estates created thereout*, and all the

(*y*) *Withrington v. Banks*, Sel. Ca. Ch. 31. v. *Denny*, 1 Ball & Bea. 202.—Ed.]

(*b*) 2 Vern. 84.

(*z*) 3 Atk. 518.

(*c*) Vide *Charlton et al. v. Low et*

(*a*) 3 Atk. 4. *Lacon v. Martins*, al.' 3 Wil. 328. [Vide infra, 472, 1 Wils. 34. [Et vide S. P. *Hamilton* 473, 4.—Ed.]

(Q) And if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate where the title has been impeached, the mortgagee may add this to the principal of his debt, and it will carry interest. *Godfrey v. Watson*; 3 Atk. 518. And a mortgagee in possession will be allowed expences necessarily incurred for the protection of the estate. *Trimleston v. Hamil*, 1 Ball. & Bea. 577. He is bound to keep the premises in tenantable repair, infra, 920, *et seq.* But *qn.* if he is entitled to interest on costs and expences, or on advances for repairs, protections, or improvements.

incumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it to be severed to the detriment of a bona fide purchaser. Therefore a mortgagee shall have the benefit of all the interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice: and, consequently, if there be a term in a mortgaged estate held in trust for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the trustees of such a term assigned to attend the inheritance, will, in equity, become trustees for the mortgagee of the inheritance.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, with a good title, the mortgagee will be entitled, in equity, to the benefit of it; for it will be considered there as a *graft* into the old stock, and as arising in consideration of the former title. As where houses and lands were demised for a long term, and an assignee of the lease, believing he had a good title, mortgaged it for 100 $\%$, afterwards the title turned out to be bad, the estate belonging to another person (*d*). Then the real owner of the estate, out of compassion to the assignee, who had built upon it, leased the premises for a long term to trustees for his wife, he being run away. And, on a bill filed, the trustees were

Good title acquired after mortgage enures to mortgagee's benefit (Q 2).

(*d*) *Seabourne v. Seabourne*, 2 Vern. 11.

(Q 2) If the mortgagor obtain a renewal, or the grant of a fresh term in remainder, without the privity of the mortgagee, such fresh term will be considered as held in trust for the mortgagee. And though the mortgaged lease may be surrendered or expired by efflux of time, still the fresh term must be assigned to the mortgagee to hold till the debt is satisfied. *Luckin v. Rushworth*, 2 Ch. Rep. 113. Finch, 392. 6 Mod. 57. Where the title to a term which was in mortgage proved to be defective, and the owner of the estate, out of compassion to the lessee, (who had built on the premises and absconded in debt,) demised the premises for a long term of years to trustees for the benefit of the mortgagor's wife, the Master of the Rolls considered the new term as a graft on the original stock, and the benefit of it above the rent reserved, as arising in consideration of the former title, and therefore decreed the trustees to make a new mortgage to the mortgagee. *Seabourne v. Powell*, 2 Vern. 11.

Renewals.

granted to stay felling any more. But a distinction is made decreed to make a new mortgage to the mortgagees; the Master of the Rolls saying, that this was a graft on the old stock, all the benefit of it, except the rent reserved, arising in consideration of the former title.

Recovery by tenant in tail, lets in all preceding incumbrances.

If tenant in tail make a mortgage, and afterwards suffers a common recovery, that will let in the mortgage(e), and so it will any other incumbrances. And the reason is, that whatever act binds the tenant in tail himself, shall bind the recoverers, or the person or persons to whose use the recovery is suffered; for he who recovers cannot say, that he against whom he recovered had but an estate tail.

Assignees of bankrupt mortgagor (tenant in tail) shall have estate discharged of mortgage for years (R).

But where tenant in tail in possession mortgaged for years, and then became a bankrupt, and died without suffering a common recovery, it was held, that the assignees of the bankrupt should have the estate clear of the mortgage.

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Effect of bankruptcy of tenant in tail on mortgage made by him.

Both these points came before the Court of King's Bench, in the case of *Beck v. Welsh* (f), on a case reserved on on ejectment, in which a verdict was given for the plaintiff, subject to the opinion of the court on this short case. T.G. being seised in fee tail of the lands in question, made a mortgage thereof to the defendant for a term of five hundred years, without having suffered a recovery, and afterwards became a bankrupt, and died before bringing the ejectment. The lessor of the plaintiff was the assignee under the commission, and claimed title under the stat. 21 Jac. 1. c. 19. s. 12, which enacts, that the commissioners of bankrupt "shall have power

(e) Poph. 5, 6. [Et vide *Goddard v. Complin*, 1 Ch. Ca. 119, ante, 165.—Ed.]

(f) *Beck v. Welsh*, 1 Wils. 276. [Et vide *Sutton v. Stone*, 2 Atk. 101.—Ed.]

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(R) *See square*, and see *Coy. Rec.* §54. The present opinion of the profession is there stated generally to be, that "a common recovery suffered by a tenant in tail confirms and lets in a prior mortgage, and it should seem that the bargain and sale of the commissioners would have the same effect." Et vide 6 Dow. P. C. 60. It should also be observed, that if an *infant* tenant in tail take the benefit of the insolvent act (49 Geo. 3. c. 115,) his estate tail will not pass to his assignees, because he could not be legally in custody for debt. *Burton v. Haworth*, 5 Madd. 50.

“ by deed inrolled to grant, bargain, sell, and convey, all
 “ manors, &c. whereof any bankrupt is or shall be seised, of
 “ any estate tail in possession, reversion, or remainder, to any
 “ person or persons, for the benefit of the creditors of such
 “ bankrupt, and that such grants and sales shall be good in
 “ law against such bankrupts, the issues of their bodies, and
 “ against every person claiming any estate, right, title, or in-
 “ terest, under such bankrupts, *after such time as such per-*
 “ *sons shall become a bankrupt,* and against every person what-
 “ ever *whom such* bankrupts by common *recovery* or other-
 “ wise, *might* cut off or bar from any remainder, reversion,
 “ rent, profit, title, or possibility, into or out of any of the
 “ said manors,” &c. The case was twice argued at the bar,
 and two questions were made, 1st. whether, if the tenant in
 tail had suffered a recovery, it would not have let in this mort-
 gage for five hundred years? 2dly. whether the statute does
 not operate as a common recovery to all intents and purposes?
 The first question was resolved in the affirmative. But as to
 the second, it was said *per curiam*, the statute of 21 Jac. 1.
 c. 19. s. 12, was made for the benefit of creditors who had no
 special lien upon the lands of a bankrupt, and not for any par-
 ticular creditors who relied upon the title they accepted of.
 That tenant in tail, without suffering a recovery, could only
 affect the estate for his life, and he being dead, the mortga-
 gor's title was at an end; and this statute never intended to put
 the prior incumbrancers on an estate in tail in a better case
 than they would otherwise have been if the statute had never
 been made. It would be very strange to say that this statute,
 which was most plainly made for the benefit of all creditors,
 should have an effect which was quite contradictory thereto,
viz. to make good a defective title to a particular creditor.
 It was impossible the legislature could ever intend any such
 thing.

*Stat. of Jac.
 operating as re-
 covery does not
 confirm prior
 incumbrances of
 bankrupt tenant
 in tail. Sed qu.*

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But, high as the authority of a case ought to stand, which
 was decided by the unanimous opinion of such eminent and
 distinguished lawyers as Lord Chief Justice Lee, and Justices
 Wright, Sir Michael Foster, and Denison, it seems open to
 the observation, that, if it be law, it is an anomalous case in
 the law of bankruptcy, it having been the uniform construction

*Observations in
 derogation of
 authority of
 last case.*

of the statutes on that subject, that the assignees of a bankrupt come exactly into his place, and take his property, subject to all liens to which he is subject. The Court of King's Bench, in determining on the last case, seem to lay considerable stress upon the argument of the absurdity of deciding that the clause in the statute of Jac. 1. then in question, which was most plainly made for the general benefit of all the creditors, should have an effect which was quite contradictory, viz. to make good a defective title to a particular creditor, it was impossible, they said, that the legislature could ever intend any such thing. As it strikes me, the same observation is applicable to the whole system of the bankrupt laws. They were all made for the general benefit of all the creditors of the bankrupt, but yet, in construction, they were not considered as interfering with the rule, that wherever a right in equity attaches against any person, that equitable right binds all persons claiming under or against that person, who have not specific liens upon any part of his property. General creditors are in all cases bound by a particular equity. The true question, therefore, with deference to the great authority in question, was not that put by the court; but it was, whether the legislature, acting upon the system of the bankrupt laws, intended any further by this act than to place the commissioners in the same situation as the bankrupt himself could do, by levying a fine, or suffering a recovery, or otherwise, in case he had not committed any act of bankruptcy. The act, as I understand it, enabled the commissioners to make just such a title to the assignees, as the bankrupt himself might have done, *after such time as such person became bankrupt*. It seems just to the creditors, that the commissioners should, for their benefit, have power to make a title to all the estate, and bar all the persons which the bankrupt himself was capable of doing. But upon what principle the creditors are to be put in a better condition than the bankrupt could have put them in by any act of his, I am, I confess, at a loss to conceive. The legislature seem carefully to have provided against such construction, by providing that the grant of the commissioners shall be available; against whom? All persons claiming any estate, right, title, or interest, under the bankrupt, *after such time as he shall become bankrupt*, and against all other persons whom he might bar.

It seems a great stretch, therefore, in construction, upon the rights of other persons, if the commissioners are capable of extinguishing rights which the bankrupt himself could not; rights prior to such time as he became bankrupt. The conveyance made by the commissioners is to be good against all persons who claim under the bankrupt, after such time as he became bankrupt, and whom the bankrupt himself may, by common recovery or other means, debar of any remainder, reversion, rent, profit, title, or possibility, &c. Now in this case, did the mortgagee claim under the bankrupt *after* such time as he became bankrupt? Could the bankrupt, at the time of the conveyance from the commissioners, bar the mortgagee by a common recovery? The answer to both propositions must be in the negative. The mortgage was *before* the act of bankruptcy, and a common recovery by him would have let in this incumbrance upon the entire fee simple. But whatever may have been the fate of this question at law, I cannot but conceive that the right of the mortgagee would have prevailed in equity, it being a principle there, that the assignees take the property of the bankrupt, subject to such equitable lien as the bankrupt himself is subject to, and that even in cases where the assignees gain the legal estate. Vide 1 Atk. 192. 2 Atk. 562, and *Russel v. Russel*, 1 Bro. Rep. Chan. 269. Now, it is apprehended no doubt can be entertained but that the mortgagee in the principal case, might in equity have required the bankrupt, during his life, to have suffered a recovery to complete and establish his security, and it seems equally clear, upon the principle of the adjudged cases, that the same equity subsists against the assignees, who stand in his shoes as to his property (s).

(S) These observations of the learned author are entirely accordant with the principles of equity, and have been fully concurred in and even enforced by Sir William Grant, the late Master of the Rolls. In delivering his judgment in the case of *Mitford v. Mitford*, 9 Ves. 100, his Honour remarked—Is an assignee, under a commission of bankrupt, placed in a different situation from that of a bankrupt himself? He (Sir William Grant) had always understood that the assignment from the commissioners (like any other assignment by operation of law) passed the rights of the bankrupt precisely in the same plight and condition as he possessed them. Even where a complete legal title vested

Assignees take subject to all equities of bankrupt [infra, 542. 604. 6.]

Covenant for further assurance, will bind assignees, and they must redeem or confirm mortgage (T).

But it was held by Lord Northington, in a subsequent case (g), that if there be a covenant for further assurance in the mortgage deed, by the bankrupt tenant in tail, that will entitle the mortgagee to all the interest, which, on the bankruptcy, and the operation of law thereon, vests in the assignees.

This question afterwards came on before Lord Thurlow, in the case of *Pye v. Daubuz* (h). A. tenant in tail, borrowed 800*l.* of B. and conveyed the intailed lands to B. in fee, by way of mortgage for securing the same, and therein covenanted for the title, and for further assurance. Afterwards A. became a bankrupt, and a bargain and sale of his real estates was made by the commissioners to the assignees. A. filed his bill against the assignees, and therein insisted, that as he was entitled, by virtue of the covenants, to have called upon B. if he had not become a bankrupt, to have suffered a recovery of the premises for making a further assurance thereof to him, that the assignees standing in his place were bound so to do, and therefore the bill prayed an account, and that the defendant might be decreed to pay what should appear to be due or be foreclosed. The counsel for the plaintiff relied upon the case of *Taylor v. Wheeler*, 2 Vern. 564, whereby it was determined, that the assignees of a bankrupt take the estate affected by every equity with which it was affected in the hands of the bankrupt, and the case of *Edwards v. Applebee*. The counsel for the defendants (the assignees) relied upon the

(g) Vide *Edwards v. Applebee*,
2 Bro. Rep. Cha. 652, n. 1.

(h) 3 Bro. Cha. Ca. 595. [S. C.
2 Dick. 759.—Ed.]

in the assignee, and there was no notice of any equity affecting it, he took subject to whatever equity the bankrupt was liable to. Et vide S. P. 2 Ves. & Bea. 309.

Assignees bound by covenant for further assurance.

(T) Accordingly, Lord Thurlow, C. in the case of *Tourle v. Rand*, 2 Bro. C. C. 652, in answer to Mr. Ibbetson, who contended, that the defendant being tenant in tail could mortgage for his life only, and that after his decease the assignees would be entitled to the estate discharged of the mortgage, observed, that if a tenant in tail mortgage, and afterwards will suffer a recovery, it will make good the former title, and the covenant for further assurance might be taken hold of as a plank.

case of *Beek v. Welsh* (i). *Et per* Lord Chancellor.—The cases seem to be contradictory. His Lordship was not aware of the case in *Wilson*, which appeared to have been determined with great deliberation, and by great judges. Yet the argument did not appear to him satisfactory. The court then held the incumbrancer not to be let in, considering the statute as declaring the use of the bankrupt's estate for the benefit of all his creditors. He should have agreed with Lord Northington in a different construction of the statute, conceiving its object only to be saving the expence of a recovery, and that its effect would be to let in the incumbrance, and to convey not only all that the bankrupt had conveyed, but more. Therefore, if the case in the Common Pleas had not been cited, he should have adopted Lord Northington's construction. But that Mr. Lloyd said, the case in the Common Pleas had been acted upon in the Exchequer; and it would be improper to let that case stand at law, and to determine otherwise in equity.

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The cause stood over; but afterwards his Lordship decreed, that the defendants should redeem the mortgage, or stand foreclosed, and execute proper conveyances, of the mortgaged premises, to the plaintiff and his heirs.

If a mortgagee procures a grant of a new term, after the old one is actually expired, yet this will be a trust for the mortgagor, and redeemed with the principal (k); for it is supposed to have proceeded from having had the original term: and, although there be nothing in fact, in having a tenant-right, yet, as such regard is had to it, in the estimation of the world, it will be looked on as the occasion of the lease (U).

Terms for years renewed by mortgagee, ensure to benefit of mortgagor.

(i) *Supra*, 191.

in Ch. 55. *Lee v. Lord Vernon*, 7 Bro.

(k) *Rakestraw v. Brewer*, Sel. Ca. Par. Ca. 432.

(U) Many attempts have been made to establish an obligation on landlords to renew, but they have not succeeded. The renewal, therefore, is still a matter of chance and favour; but it is so far valuable that it is in the eye of the law an interest, and in the estimation of the world, a benefit, which enhances the price of the property on sales; and to a certain extent it is taken notice of, and enforced in equity. It is true, that if the landlord pleases, he

Tenant right of renewal.

*Mortgagee
obliged to re-
pair.*

But the mortgagee is not obliged to lay out money, except to keep the estate in necessary repair (1).

(1) 3 Atk. 518. [S. P. *Russell v. Smithers*, 1 Anstr. 96. Ante, 189, et infra, 920, et seq.—Ed.]

may grant a *bond fide* lease of the premises to a fresh tenant even at a less rent, or on a less fine than the former tenant paid. But if the lease be gained by undue means, as by suppression of the tenant right of renewal or otherwise, a court of equity will decree that the new or reversionary lease shall enure to the benefit of the person interested in the ancient lease, and consequently that he who obtains such new lease, and thereby becomes legally possessed of the premises, shall be a trustee for the use and behoof of the person entitled to the tenant right of renewal. The tenant right of renewal is a part of the tenant's interest in the lease. *Winslowe v. Fishe*, 2 Ball & Bea. 205. The cases on this head, says Mr. Butler, in his truly useful notes to Coke upon Littleton (290 b. n. 1. s. 11), may be divided into three classes.—The first, where the renewal has been obtained by persons having no beneficial interest in the old lease, and no connection with the lessee, and has been obtained by a suggestion of what was false, or a suppression of what was true. The second, where the parties obtaining the renewal have no beneficial interest, but are connected with the old lessee, as guardians, trustees, or executors. The third, where the persons renewing have only partial and limited interests as tenants for life, mortgagors, or mortgagees. In all these cases the parties renewing have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances of the case; the court presuming that the new lease was obtained by means of the connection with or reference to the interest in the ancient lease.

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*Of renewals in
Ireland.*

In Ireland the cases on this subject rest on a peculiar local equity, it being there considered a part of the policy of the kingdom to protect the rights of tenants. If they neglect to renew at the proper time, yet on payment of the fine and interest from the time it became due, the court will generally indulge them with a renewal; and by the 19 & 20 Geo. 3. c. 20 (Irish statutes), it is provided, that in all cases of mere neglect, where no fraud appear to have been intended, and there has been no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord had demanded the fine, courts of equity shall relieve on an adequate compensation being made. Et vide *Boyle v. Lysaght*, Vern. & Scriv. 135. *Magrath v. Lord Muskerry*, Ib. 166. By the statute 8 Geo. 1. c. 2. s. 4, nine calendar months (2 Sch. & Lef. 241,) are allowed to the lessee, and those claiming under him, to redeem after the lease has expired, on paying the rent in arrear, renewal fines, and costs, to be ascertained in such manner as in the act is directed. A mortgagee redeeming and procuring a new lease within that time, will be considered as having obtained it in his character of mortgagee, and such new lease will be held to be a graft on the old stock, subject to redemption by the mortgagor on payment of principal, interest, fines, and expences of renewal, &c. But if the mortgagee, on being served with notice of an ejectment, brought by the landlord

The mortgagee of an estate to which an advowson is annexed, or of a naked advowson, having the legal estate, has consequently a right to present at law (*m*); but since a presentation is gratuitous, and the mortgagee cannot account for any benefits from it, a court of equity will compel the mortgagee to present the nominee of the mortgagor (*w*).

Mortgagee of advowson compellable to present nominee of mortgagor.

(*m*) Com. Rep. 609. [S. P. *Dyer v. Lord Craven*, 2 Dick. 662.—*Ed.*]

against the lessee mortgagor, to turn him out of possession, gives full notice that he will not redeem the lease, relying on his personal covenant for payment of his money, and after the nine months have elapsed treats with the landlord for a new lease (with an express stipulation that if the lessee mortgagor shall within a limited time make a lodgment with the landlord for the purpose of redeeming, the contract shall be at end, thereby giving the mortgagor full opportunity of disposing of his interests, and redeeming if he shall be enabled to do so), and after the time limited (no lodgment being made) the mortgagee obtains a new lease of the mortgaged premises for his own benefit, on payment to the landlord of the rent in arrear, costs, renewal fines, and every thing that is due, this lease will not be a graft on the former lease, nor a trust for the lessee mortgagor; for the mortgagee will not have obtained it by being in possession, nor by fraud or contrivance behind the back of the mortgagor, nor by virtue of any remnant of the old lease (which was expired), nor of any tenant right of renewal on which the new lease could be engrafted. See *Nesbit v. Tredennick*, 1 Ball & Bea. 29. Et vide *Adams v. St. Leger*, Ib. 181, where a demurrer was allowed to a bill by a mortgagee of leasehold premises, evicted for non-payment of rent against the landlord seeking a redemption, because the lessee mortgagor was not a party. The principle, observed Lord Manners, in the case of *Nesbit v. Tredennick*, which courts of equity act on in considering renewed interests obtained by mortgagees grafts, is, that the advantage was procured by being in possession, or when out of it, by a contrivance to oust the lessee of the benefit of the renewal.

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continued.

In mortgages of leasehold property, where the chance of renewal exists, care should be taken to insert in the mortgage deed a covenant from the mortgagor for the renewal of the lease, and for vesting such new lease in the mortgagee, with an agreement, that if the mortgagor should neglect to renew, it shall be lawful for the mortgagee to renew, and that the fine and expences of renewal shall be a charge on the premises, and bear interest. See the forms in the Third Volume; and for the cases on this subject, which are numerous, see *Raine v. Chichester*, Amb. 715. 7 Bro. Par. Ca. 432. 17 Ves. 299. 3 Meriv. 196. *Fitzgerald v. Rainsford*, 1 Ball & Bea. 57. *Mulrany v. Dillon*, Ib. 40. *Eyre v. Dolphin*, 2 Id. 195. 280. 290. *Frankfort v. Thorpe*, Ib. 372. 2 Madd. Ch. 149. Chamb. on Leases, 201. 2 Bridgm. Index, 150, 2d edition, and ante, 190.

Practical caution. Reference to cases.

(*w*) And if a third person be interested, the court will remove the mortgage out of his way, so as to prevent the mortgagee from setting up a legal title, although the mortgagee be in possession. Thus where the mortgagor made a

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Simoniackal presentation by mortgagor, turn lost.

Mortgagor not compellable to present nominee of mortgagee, for mortgagee can make no benefit of presentation;

And upon the same principle, if a mortgage be made of a manor to which an advowson is appendant, and a *quære impedit* be brought by the mortgagee to compel the mortgagor to present his nominee, the Court of Chancery will grant an injunction to stay proceedings thereupon (n); for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof to sink or lessen his debt; the mortgagee, therefore, in that case, until foreclosure, is but in the nature of a trustee for the mortgagor (x).

except perhaps to provide for a child, &c.

A distinction was attempted, in the case of *Gardiner v. Griffiths* (o), between this case, and that, in which the mortgage was of a long term in a naked advowson; because the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather, for that it was expressly so agreed in the mortgage deed, but the court gave no opinion thereupon. And,

(n) *Amburst v. Dawling*, 2 Vern.

401. *Jory v. Cox*, Pre. Cha. 71.

[accurately stated from the Register Book, in a note to 2d edition.—Ed.]

Attorney-General v. Searisbrick et al.

2 Vern. 549. *Dymoke et al. v. Sir*

John Hobart, 1 Bro. Par. Ca. 81.

Gully v. Serjt. Selby, Stra. 403. S. C.

Com. 343. [2 Woodes. Lect. 154.—Ed.]

(o) 2 Will. 404.

simoniacal presentation of A., who was rejected by the bishop, and then he and the mortgagee (who was in possession of the manor to which the advowson was appendant) joined in presenting B., but before their nominee was instituted and inducted, G. procured the title of the crown, and brought an information to remove the mortgagee's title, that it might not be set up at law, the court granted it. *Attorney-General v. Hesketh or Sudell*, 2 Vern. 549. Pre. in Ch. 214.

Reason why mortgagee may not present.

(X) As a trustee cannot be permitted to make any benefit out of the trust fund, so neither shall a mortgagee get any advantage out of the mortgage fund beyond the principal and interest. For this reason it is, that a mortgagee is not at liberty to present to a living though he be in possession, though there be no other security than the advowson, and though the mortgagor neglect to pay the interest. The presentation is a profit arising from the mortgaged estate, for which the mortgagee cannot give credit in account upon a redemption. Per Lord Redesdale, in *Gubbins v. Creed*, 2 Sch. & Lef. 218. A mortgage of an advowson is therefore one of the worst securities a mortgagee can well have.

in the case of *Mackenzie v. Robinson* (p), which was the case of a mortgage of a naked advowson; Lord Hardwicke doubted the legality of such a covenant, *that the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favor, gave up the point of presenting; in consequence whereof, an order was made that the mortgagor should have liberty to present, and the mortgagee was obliged to accept of his nominee.

Legality of covenant that mortgagee shall present, doubted (y).

But if the mortgagee present to an advowson a bill by the mortgagor, to compel the incumbent to resign, and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbent (q).

If mortgagee present, and six months elapse, it will be good (z).

(p) 3 Atk. 560.

(q) *Gardiner v. Griffiths*, 2 Will. 405. 3 Atk. 458.

(Y) Sed vide 1 Madd. Ch. 515, 2d edition, where it is said, "that though until foreclosure the mortgagor presents, yet where there was an express covenant in the mortgage deed that the mortgagee should present to fill up all the avoidances until discharged, it was decreed for the mortgagee. *Gardiner v. Cooke*, Dom. Proc. 31st Jan. 1728." This, it is conceived, must be the same case as that of *Gardiner v. Griffiths*, 2 P. Wms. 405, where the reason for the decree in favor of the mortgagee is stated to arise not from any right which the covenant gave the mortgagee, but from the laches of the mortgagor in not suing his remedy before the expiration of the period limited by the statute; and see 2 Fonbl. Trea. on Eq. 258, 5th edit. for a doubt similar to that stated in the text.

(Z) The six months were provided by the second statute of Westminster, 13 Edw. 1. s. 1. c. 5. Before the statute whoever could first procure his nominee to be inducted had the preference. The party injured had not an hour left to complain after the church was full, and that for the preservation of the peace of the church. Then came the statute limiting the period at six months, within which it should be lawful for the party wronged to prosecute his remedy. In *Boteler v. Allington*, 3 Atk. 458, the party injured sought to be relieved, after the expiration of the statutable period, on equitable grounds. But Lord Hardwicke (according to a MS. note of that case, referred to by the present Lord Chancellor in *Mutter v. Chauvel*, 1 Meriv. 493.) put to himself this difficulty, "If I interfere on equitable grounds, at any period after the time is expired which the statute has provided for the peace of the church, why should I not interfere at the end of forty or fifty years? Where is to be the limit?" His Lordship then supported himself on *Gardiner v. Griffiths*, where Lord Eldon said, the House of Lords had determined that if a mortgagee presents, although he is in some sense guilty of a breach of

Nominee of mortgagee in by wrong, but his title good.

Instead of fore-
closing mort-
gage of advow-
son, sale should
be prayed.

Mortgagee
takes estate as
it leaves mort-

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gagor, its te-
nant for life
mortgaging by
fine creates for-
feiture, and
mortgagee will
lose his se-
curity;

In such case the mortgagee, instead of bringing a bill of foreclosure, should pray a sale of the advowson (qq).

A mortgagee takes the estate mortgaged in the same plight that it is, in the hands of the mortgagor. If the mortgagor, therefore, has done any act that amounts to a forfeiture, the mortgagee will lose his security.

Thus, where tenant for life (r), with remainder to his wife for life, remainder to his sons in strict settlement, remainder over, having occasion for money, together with his wife, mortgaged the estate settled by way of lease and release, and fine, *come oco*, &c. which mortgage was afterwards assigned to the plaintiff, and another lease and release, and fine, levied and executed by the husband and wife for the making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem, or to foreclose them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage settlement of his father and mother, who were but tenants for life, and insisted on the forfeiture; and the court allowed the plea: the Lord Chancellor saying, that this was a contrivance to destroy the settlement and disinherit the son; and his Lordship said, he had so decided in many cases, particularly in the case of *Sir Harry Peachy v. The Duke of Somerset*.

But the following case, which preceded the foregoing one in point of time, seems to have received a contrary decision, unless the circumstance added by way of note by the reporter can

(qq) [3 Atk. 559.—Ed.]

(r) *Lady Whetstone v. Sainsbury*, Pre. Cha. 591.

As to notice.

trust in so doing, yet they would not disturb the presentation after the lapse of the statutable period.—Whether notice to the nominee of the mortgagee's title would have any effect on the transaction does not distinctly appear; but in the above case of *Boteler v. Allington*, where a trustee presented, and the nominee knew of the character, Lord Hardwicke observed, that the party presented might have had notice of the trust without having notice that it was inconsistent with the duty of the trustee to have presented him. This, it must be acknowledged, observed Lord Eldon, was going very near in point of equity. *Mutter v. Chaurel*, ubi supra.

be considered as taking the case out of this rule, and I am not aware upon what principle that circumstance can be made to affect the remainder-man.

There tenant for life, remainder in fee to his son, under a devise from his sister, whose heir he was, made a lease of the devised premises by way of mortgage, and levied a fine to the mortgagee for corroborating the term (s). The son came of age, and brought his ejectment founded upon the forfeiture committed by his father by levying the fine, and recovered; and upon a bill by the mortgagee to be relieved, the Master of the Rolls decreed, that the mortgagee should hold and enjoy against the son during the life of the father (A).

but allowed to hold during life of tenant for life, although estate for life forfeited. (Sed qu.)

But the reporter of the preceding case adds, by way of note, that the father, on making the mortgage, had made affidavit, that the devisor under whom he claimed died intestate, and that he knew of no incumbrances on the estate, although he had proved her will long before,

It has been at times made a question, whether, when a man devises his lands for payment of his debts, all his debts shall not be thereby put upon the same footing; the consequence of which would be, that his simple contract debts, as well as his specialty debts, would bear interest; and some countenance is given to those who contend on that side of the question, which favors the simple contract creditors, in the case of *Car v. The Countess of Burlington* (t), as reported in Peere Williams. In

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Devise for payment of debts without preference, puts simple contract debts on footing with specialty debts, both carrying interest (B).

(s) *Willis v. Fincaux*, Pre. Ch. 108.

estates with unsatisfied debts, simple contract debts were to be reckoned among the number. *Sanderson v. Whar-ton*, 8 Price, 680.—Ed.]

(t) 1 P. Wms. 228. [It was however in a late case made a question, whether, under a will charging real

(A) This is contrary to first principles, and we cannot but suspect the accuracy of the report, when the circumstance alluded to in the note by the reporter, could have been considered as at all affecting the remainder-man.

(B) It does not immediately appear how the subject of this and the five next ensuing pages is connected with an inquiry into the estate and interest of the mortgagee, nor indeed how it relates in any degree to the subject of this treatise. The author may have designed it for his "Essay on Devises;" for which it would certainly have been more appropriate.

that case, Lord Burlington, owing debts by bond and simple contract, made a lease of all his lands in England and Ireland, to trustees in trust, to pay all the debts which he should owe at his death, all to be paid in a just proportion, without preference of one debt before another. And Lord Harcourt is stated to have determined among other points, "that by this trust term the simple contract debts became as debts due by mortgage, and consequently should carry interest, as well as debts secured by bond." And the same proposition is affirmed by Lord Macclesfield, Chan. in the case of *Maxwell v. Wettenhall* (u), where lands are devised by a man for payment of his debts, on the ground that the land, which is the fund, yields annual profits (c).

Over-ruled, and held that simple contract debts do not carry interest (v), except when, vide *infra*, 202.

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But this opinion of Lord Harcourt, if given by his Lordship, as to which great doubt is entertained, has since been over-ruled; upon the principle, that providing for the payment does not, in the first instance, alter the nature of the debt, and then, although a debt upon bond is the principal and interest also, that is, the interest is part of the debt, yet it is not so as to simple contract debts, for they do not bear interest, and therefore the interest is no part of the debt, and then there seems no reason why the providing for the payment of such debt, should so far alter its nature as to make the interest a part of it. And if it were so, great prejudice might from thence ensue to creditors, as it would make people afraid to charge their lands with the payment of their debts,

(u) 2 P. Wms. 26.

(C) No such declaration as that imputed to Lord Harcourt appears in the Register Book. In *Maxwell v. Wettenhall*, ubi supra, there is only a dictum on the subject, the point before the court being as to the interest of legacies; but in *Bothomley v. Lord Fairfax*, 1 P. Wms. 384, upon a devise for payment of debts, interest was allowed on simple contract debts from a year after the testator's decease.

(D) This is now the uniform doctrine of the court, *Chapman v. Ansell*, MS. referred to in 1 Madd. Ch. 611, 2d edit.; and a provision by will for payment of interest on debts, it has been held, will not extend to a debt by simple contract. *Tait v. Lord Northwick*, 4 Ves. 816; and see more on the subject of what debts carry interest, *Crenze v. Hunter*, 2 Ves. jun. 157. *Raphael v. Beckm*, 11 Ves. 92, and 13 Ves. 407. 590.

lest they should thereby bring a great burthen upon their estate, by changing the nature of their demands upon it. And, therefore, the constant course of the court in such cases, is to refer it to the Master, to see what is due, and to allow interest on such of the debts as in their nature carry interest. And accordingly Lord Hardwicke, in the case of *Barwell v. Parker* (y), in which this question arose upon a trust term created by deed, for payment of debts and legacies, out of a real estate on the death of the owner, held, that there was no colour for such a demand; his Lordship observing, that if a man by will created a trust out of real estates for payment of debts and legacies in aid of personal estate, there was no case in which the court had said, *that* should make simple contracts carry interest; and that a trust term, though created by deed, was of the same nature; such a clause would not have the effect to turn simple contract debts so far into the nature of specialty debts as to carry interest. And his Lordship rejected the authority of the case of *Car v. Burlington*, being of opinion that what Lord Harcourt went upon, if he so decreed, did not appear, but he probably rested on some words in the deed, which were not stated in the report. Lord Hardwicke admitting that a clause might be so penned, as to shew an intent in the testator, or settler, to put simple contract debts on the same foot as specialty, as to carrying interest, and to put them on an equality. And his Lordship, in the case of *The Earl of Bath v. The Earl of Bradford* (z), again expressed his disapprobation of the case of *Car v. Burlington*; and as to the case of *Maxwell v. Wettenhall*, he considered that as too general a statement to be depended upon, especially where the discussion arose in a Court of Equity, where cases depended so much on circumstances; and his Lordship was rather inclined to think, that the question there arose on the Master's report, when it might be only as to giving interest from the particular time. And it may be observed farther, that his Lordship's opinion as to the case of *Car v. Burlington* seems to be corroborated by the circumstance, that in the Register's book (a), lib. A. 712. fo. 595. it appears to have been referred

(y) 2 Ves. 363.

Pope, 3 P. Wms. 323. Ca. temp.

(z) 2 Ves. 587. *Shirley v. Ferrers*, Talb. 220.1 Bro. Ch. Ca. 41. *Et Haslewood v.*

(a) 1 P. Wms. 228, n. 1. last edition.

to the Master to see what was due to the judgment creditors; and to carry on interest, on such of the debts, as in their nature carried interest, which is the usual direction.

Contra, if trust be by deed and schedule, for then debts are in nature of specialty.

But Lord Hardwicke observed, in the above-mentioned case of *Barwell v. Parker*, that if a man in his life-time created a trust for payment of debts, and annexed a schedule of some debts, and limited a trust term for the payment, that deed and schedule, being in the nature of a specialty; and giving a specific interest in the fund, would make the debts, though originally by simple contract, carry interest.

Debts assigned bear interest, though some are simple contract. Semb.

In the case of *The Earl of Bath v. Lord Bradford* (b), the latter of whom, by his will, created a trust for payment of his debts, *vis.* that the trustees should, by mortgage, or sale, of a competent part of the estate, raise so much money to pay debts and legacies, as the personal estate was not sufficient to satisfy; Lord Hardwicke was inclined to think that a person, who joined with the trustees in paying off the debts, taking assignments of them, would be entitled to interest, considering his not as a simple contract demand, but, taking it against the executors, as a debt or demand arising by specialty, or a covenant under hand and seal (E). But the principal case turned ultimately upon very special circumstances.

Simple contract debts carry interest from date of Master's report; infra, 920.

And if simple contract creditors file a bill in such case for satisfaction of their debts, and to have a performance of a trust by mortgage or sale of the estate for that purpose; there, from the time of the Master's report of the debts being confirmed absolute, the creditors will be entitled to interest thereupon (c). The principle upon which such debts carry interest, seems to be that they then become liquidated. There seems to be the

(b) 2 Ves. 587.

(c) Vide *Lloyd v. Williams*, 2 Atk. 108. et 1 Bro. Ch. Ca. 43.

Quality of debt must be changed to bear interest.

(E) But it was held by Lord Thurlow, that where by deed, money was directed to be raised by sale or mortgage of land, and invested in the name of a trustee to pay debts, and the residue to remain to the use of the trustee, the simple contract debts were not changed in their nature, and therefore did not bear interest. *Shirley v. Earl Ferrers*, 1 Bro. Ch. Ca. 41; *infra*, 920, et seq.

same reason why they should carry interest, from the time they are allowed by the executors or trustees, in cases where no proceedings are instituted in equity.

If a mortgagee cancels a mortgage deed, and it is found in that state in his possession, it is as much a release as cancelling a bond; but it does not convey, or re-vest the estate in the mortgagor, for that must be done by some deed (*d*). Cancellation of deed releases debt, but does not re-vest estate.

And where it was doubtful, by whom a mortgage deed had been cancelled, an issue out of Chancery was directed to try whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently, and by stealth, carried away by the mortgagor, and the seals cut off by him (*e*). [203]
By whom cancelled, triable by jury.

A bill in Chancery by the mortgagee to recover the mortgage deeds, pledged by a third person, will be retained, and is the only effective remedy. Thus, where a bill was brought by A. against B. and others, for refusing to deliver two deeds, the one a mortgage, and the other an assignment of a mortgage, which were put into C.'s hands (*f*), in order to receive the principal and interest, and who had abused his trust by pawning them to S.; it was said, *per curiam*, that A. might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was proper in bringing a bill in Chancery for the recovery of his deeds. There seemed to be little or no defence insisted upon for B.; he could not have been imposed upon by C.; for by the deeds themselves C. must appear to have no property. And B. was decreed to deliver up the deeds, and left to his remedy for his debt (*F*). Mortgagee may recover deeds unlawfully detained by third person, for in trover he could have damages only.

(*d*) *Harrison v. Owen*, 1 Atk. 520.

(*e*) *Id. ibid.*

(*f*) *Jackson v. Butler*, 2 Atk. 306.

(*F*) So a clerk in court lending a solicitor money to carry on a cause, will not be entitled to detain the papers of the client as a pledge or mortgage for the money so advanced to the solicitor. He will be decreed to deliver them up to the party, and left to get his money from the solicitor in the best way he can. *Gray v. Cockerill*, 2 Atk. 113. Solicitor, though he has a lien on, cannot pledge deeds.

Mortgagee not guilty of maintenance in supporting suits for defence of title (g).

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A mortgagee has such an interest in the estate mortgaged, that he may interfere in any suits respecting it without being guilty of maintenance (*ff*); and therefore, where it was urged in respect of a mortgagee, defendant, that the advancing of money towards carrying on a suit, to which the person to be affected, on the ground of being guilty of maintenance, was no party, must be maintenance, unless where the person, so advancing money, was the husband, father, or guardian, and on that account allowed to disburse money; it was observed by Lord Talbot, that unless every advancing of money towards carrying on a suit for a third person, were maintenance (which he thought it was not), the defendant could not be guilty thereof, because he appeared to be a party interested by virtue of a mortgage; and though he was no party to the suit, yet as he claimed a mortgage on the estate, he might lay out money in supporting the title.

Mortgagee must deliver up title-deeds to person making good a claim of which mortgagee had notice (H).

If a mortgagee lends money on the security of an estate, in which a third person, not the mortgagor, claims a title, *and of which the mortgagee has notice (g)*, but is at the same time advised by his lawyer, that the claim is ill-founded, and the mortgagee takes the title-deeds; if it proves otherwise, and the

(*ff*) [*Sharp v. Carter*, 3 P. Wms. 378. Et vide 6 Mod. 656.—*Ed.*]

(*g*) *Opie v. Godolphin*, Pre. Ch. 548.

Mortgagee should be party to suits concerning title.

(G) On the contrary, a mortgagee who holds the title deeds is so far interested in supporting the original purchase of the mortgagor, that he ought to be made a party to all suits concerning the title. *Copis v. Middleton*, 2 Madd. Rep. 410. A mortgagee has such an interest in the land, that he may interfere in all actions and suits respecting it. Thus, if it be an action of ejectment at law, he may come in and be made a defendant together with the former defendant. *Doe v. Cooper*, 8 T. R. 645. And if there be a suit in equity he may come in and be examined *pro interesse suo*. *Fawcett v. Fothergill*, 1 Dick. 19. *Cooper v. Thornton*, ib. 72. *Hamlyn v. Lee*, ib. 94. *Bowles v. Parsons*, ib. 142. So if there be a decree against the mortgagor, he may appeal in the mortgagor's name to the House of Lords against the decree. *Daly v. Kelly*, 4 Dow. P. C. 17.

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(H) And if the mortgagee had not notice, it would not, it should seem, make any difference; for if he were so badly advised as to take a defective title, or a title without inspection, he must run the hazard that a person who has a better claim would successfully enforce it, and then the mortgagee could not have any lien on the title deeds; for the mortgagor had no right to deposit them in his hands. Et vide post, 638, 9.

claim turns out a good one, he will be compelled in equity, notwithstanding such advice, to deliver up all the writings relating to it, to such claimant, except the mortgage deed, *for the writings follow the estate*. But he may retain the mortgage deed, if there be therein a covenant for the payment of the mortgage money, on which damages may be recovered.

Lord Hardwicke was of opinion (*h*), that a Court of Equity would not compel the mortgagee of an old dean and chapter lease, who should refuse, to surrender in order to a renewal; because he might have an objection to the lives proposed, and might insist the lives in being were better, or might oblige the tenant, the mortgagor, to propose other lives, or redeem him. But his Lordship said, it would indeed be otherwise, if the mortgage were of a chattel interest, and lease for years only, if, upon surrendering the old, in which there was only a remainder of a term to come, a new and longer term were to be granted: because that would be an advantage to the mortgagee, as being a better security.

Mortgagee not compellable to surrender old lease for lives; for he may like existing lives best, but contra if lease be for years, and longer term be tendered.

Where one has a mortgage, and also a bond, as a security for the same debt (*i*), he may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure; the mortgagee being at liberty to pursue all his remedies at once (*i*).

Mortgagee may pursue all his remedies at once.

By the 7th Ann. c. 19, infants having estates in lands, tenements, or hereditaments, only by way of mortgage, are enabled (*i* 2) "by the direction of the Court of Chancery or the

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Infant mortgagees enabled and compellable to convey by di-

(*h*) *Dr. Winne v. Bampton*, 3 Atk. post, 966, 7. [*Colley v. Gibson*, 3 Smith, 477. 516.—*Ed.*]

(*i*) *Burnell v. Martin*, Dougl. 417.

(*I*) This rule was acknowledged in *Schoole v. Sall*, 1 Sch. & Lef. 176, by Lord Redesdale, C. for which see ante, p. 15, and where a mortgagee, who had acquired possession of the estate by ejectment, brought an action at law on the covenant for repayment of the money, and at the same time filed his bill to foreclose the mortgage, the court held it regular, and said equity would not stop the proceedings at law unless the defendant brought in the money. *Rees v. Parkinson*, 2 Anstr. 497.

Text confirmed.

(*I* 2) The statute recites, that "whereas many inconveniences do and may arise by reason that persons under the age of twenty-one years, having estates

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rection of court
under statute of
Anne. [See
new act, *infra*,
207.]

Court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians, of such infant or infants, or person or persons entitled to the monies secured, by or upon any lands, tenements, or hereditaments, whereof any infant or infants are or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the Courts of Chancery or of Exchequer shall, by such order so to be obtained, direct to any other person or persons, and such conveyance or assurance, so to be had or made as aforesaid, shall be as good and effectual in law to all intents and purposes whatsoever, as if the said infants or infant were, at the time of making such conveyance or assurance, of the full age of one and twenty years." II. And be it further enacted, "that all and every such infant or infants, being only trustee or trustees, mortgagee or mortgagees as aforesaid, shall and may be compelled by such order, so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances, as aforesaid, in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust estates or mortgages." (K)

in lands, tenements, or hereditaments, only in trust for others, or by way mortgage, cannot (though by the direction of the *cestui que trust* or mortgagor) convey any such estate in any such lands, tenements, or hereditaments, to any other person or persons;" for remedy whereof it is enacted, that "it shall and may be lawful to and for any such person or persons under the age of twenty-one years," by the direction, &c. as above.

(K) Until the passing of this act, if the real estate chanced to descend, or come to an infant, the mortgagor could not obtain a re-conveyance of his estate until such infant attained the age of twenty-one years. Dick. 616. S. P. 2 Mod. 174.

Infant mort-
gagee compel-
lable to convey
at suit of mort-
gagor or his
executor.

An infant mortgagee is not a trustee for the mortgagor only, but also for the executor of the mortgagee. One of the inconveniences that the statute of Anne intended to remedy, was, that the executor should not wait for his money till the full age of the heir. Hence it follows, that the executor of the mortgagee may apply for a conveyance from the infant as well as the mortgagor. *Holesworth v. Lane*, Mosl. 197. See also *Bellamy Ex parte*, 2 Cox, 422. *Chandler v. Beard*, 1 Dick. 392. *Benton Ex parte*, ib. 394. *Carter Ex parte*, 5 Madd. 81, and *Ward Ex parte*, ib. 291. A mortgagee in fee devised

On a petition preferred to Lord Hardwicke (*k*), praying that an infant, the heir of a mortgagee in fee, who was like- *Infant fême covert directed to convey by fine.*

(*k*) *Ex parte Maire*, 3 Atk. 479. Com. Rep. 615.

to three persons, and the survivor of them, and the heirs of such survivor. The infant heir of the testator was directed to join in re-conveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Harrison's case*, 3 Anstr. 836.

On the construction of this act, it is observable, that it applies to lands in Ireland, and to lands in the East and West Indies, *Evelyn v. Forster*, 8 Ves. 96. *Anderson Ex parte*, 5 Ves. 242. *Prosser Ex parte*, 2 Bro. C. C. 325. *Fennillitean Ex parte*, 2 Dick. 669; as also to lands of copyhold tenure as well as freehold lands. Watk. on Co. 63. It extends to plain and express trusts in writing, or to such as are established by a decree, but not to trusts which are implied or constructive merely. *Vernon Ex parte*, 2 P. Wms. 549. *Goodwyn v. Lister*, 3 Ib. 387. To bring a case within the statute, the infant must be a dry or naked trustee, as it is termed. *Handcock ats.* ———, 17 Ves. 383. But his being beneficially interested in the assets administered by the executor, will not take the case out of the statute. Thus in *Carter Ex parte*, 2 Dick. 609, the mortgagee of a mortgage in fee dying intestate, and his heir being an infant, and one of his next of kin, and consequently entitled to a share of the mortgage money, the Master would not find him to be an infant mortgagee within the statute; for that he was not, as he conceived, a mere naked mortgagee, but the Lord Chancellor (Thurlaw) after time taken to consider, said, it was clear that he was a mortgagee within the act, and directed him to convey accordingly; for, said his Lordship, *prima facie* the mortgage money is part of the testator's general assets, and it cannot be part of the residue till an account of the personal estate is taken, and the debts are ascertained. Lord Loughborough carried this point a step farther, and decreed that an infant mortgagee was within the act, notwithstanding he might be beneficially interested in the money by the will of the mortgagee or otherwise; for the money belonged to the executor, who could give a good discharge for the same, and for whom, consequently, the heir was a dry trustee; and, in a latter case, (*Handcock ats.* ———, *ubi supra*) the present Lord Chancellor held, that where the infant heir at law of the mortgagee was appointed co-legatee and co-executor of the will, that made no difference. It was still a case within the statute for payment of the mortgage money to the co-executor, and his receipt and discharge left the infant a mere trustee.

Infant within stat. of Anne, though entitled to share of money as legatee, next of kin, or co-executor. [See new act, infra, 207.]

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But in a late case, a tenant in tail with remainders over, by bargain and sale conveyed to B. for the purpose of making him tenant to the præcipe in a recovery. By mistake the recovery was suffered before the bargain and sale was executed. The tenant in tail died, and it was held that the infant heir of B. was not a trustee within this statute. *Boehm Ex parte*, 5 Madd. 124. *Infant, must be a trustee, not having legal estate by mistake.*

It is laid down by Mr. Watkins, that an infant may be ordered by the Court of Chancery to surrender a copyhold which he has as a trustee or mortgagee, citing *Doe v. Morgan*, 7 T. R. 103. *Nayler v. Strode*, 2 Chan. Rep. 392. *Copyhold.*

1 Watk. Cop. 87. 4th edit. The Editor adds, that Richards, C. B. seems to have doubted this position in a late case. His Lordship inquires whether any one ever heard of an infant heir of a copyholder being considered a trustee within the statute of Anne, *Jannaway Ex parte*, 7 Price, 689. All however that was actually decided in that case was that on an ex parte proceeding in the absence of the heir, the court will most certainly not make the order. Hence it is inferred that this case does not on due consideration affect the doctrine laid down by Mr. Watkins. Ibid. 88, n.

Infant's conveyance voidable if not within statute.

Where an infant conveys as a trustee within the statute, when, in fact, he is not so, he will not be bound by his conveyance under the order of the court, yet if it be a case in which he would be bound to convey when of age, (his conveyance being voidable only during his infancy and until avoided passing the legal estate, and no one having a right to elect for him whether it should be void or not,) he would, when he became adult, be placed in such a situation, that if he sought at law to avoid his deed, a court of equity would prevent him. *Handcock Ex parte*, 17 Ves. 383.

Mode of procuring order.

The order enabling the infant to convey can be obtained by petition only, and not by motion, the former being the only mode mentioned in the act. *Evelyn v. Forster*; ubi supra. *Johnson Ex parte*, 3 Atk. 559. *Smith Ex parte*, Amb. 624. But if the infant trustee have any interest in the premises, or any duty to perform as such trustee beyond the mere conveyance, or if the trust be not in writing, it will be a case not within the statute, and a suit must be instituted. *Hawkins v. Obeon*, 1 Ves. sen. 559. *Vernon Ex parte*, ubi supra. *Attorney-General v. Pomfert*, 2 Cox, 221. *Tuttin Ex parte*, 3 Ves. & Bea. 150; and *Sergison Ex parte*, 4 Ves. 147.

Infant sole executor, bill must be filed.

In *Sergison Ex parte*, the matter in dispute was referred to a Master to ascertain whether the infant was a trustee or mortgagee within the statute, and the Master by his report stated, that the mortgagee by his will, after devising certain real estates, gave and devised all the rest, residue, and remainder of his estate, both real and personal, of what nature or kind soever and wheresoever, to J. M. C. (the infant) his heirs, executors, administrators, and assigns, on the part of his mother, and appointed the said J. M. C. sole executor, and died leaving his nephew John Wood his heir at law; and the Master further stated, that he was of opinion that J. M. C. was not a mortgagee or trustee of the said estate within the intent and meaning of the act. The principal question in the case was, whether the legal estate in the mortgaged premises passed to the infant, or whether it descended to the heir at law of the testator; and in deciding this question the Master of the Rolls said, he had read and considered the petition, and thought the Master wrong in his judgment. He was of opinion that J. M. C. was a trustee of the mortgaged premises; but his Honour said he could not order the infant to convey the estate, because he as the executor was entitled to the money secured on the mortgage, and he could not permit an infant, though he were an executor, to receive the money. He knew not what could be done without filing a bill. And the Lord Chancellor, on the case coming before him by way of appeal from the Rolls, said, the best order he could make was to confirm the report, and to order the money to be paid into the bank, in the name of the accountant-general, ex parte the infant. The parties would therefore take a conveyance from the heir at law, and when the infant came of age his Lordship

thought it very reasonable that he should join, so that then the parties would have a title *quacunqve via data*.

But although the act has been held not to extend to cases where there are trusts to be performed requiring a discretion on the part of the infant, in modern practice the rule is said to be relaxed, 1 Pres. Abs. 320. and, that if all the persons beneficially interested under the trusts to be performed are adult, and free from disabilities, and petition the court for a conveyance to their nominee, the court will treat the infant as a mortgagee or trustee within the act.

Rule requiring bill relaxed.

It is further observable, that an infant mortgagee or trustee under this act will not be ordered to convey to another trustee upon trusts to be executed. That can only be effected by a bill praying to have a new trustee appointed and a conveyance. It cannot be ordered on an *ex parte* petition. *Anderson Ex parte*, ubi supra; and see *Rigg v. Sykes*, 1 Dick. 400. And if on a reference to the Master under this statute the Master reports that the infant is not a mortgagee, &c. within the act, no exception can be taken to his report; but the party disapproving of the report must bring it on by petition, stating the report. *Burton Ex parte*, 1 Dick. 395. But when the Master reports that the infant is within the statute, he must state to whom he is to convey, *Winnington v. Foley*, 1 P. Wms. 538. *Anon.* Pr. Ch. 284; and note, the necessary costs of the infant in making the conveyance will be allowed. *Cant Ex parte*, 10 Ves. 554.

Miscellaneous observations.

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It may be proper to add, that an infant mortgagee may surrender leases in the Court of Chancery for the purposes of their renewal, 29 Geo. 2. c. 31; and an infant mortgagor may present to a benefice of which he is patron. *Arthington v. Coverley*, 2 Eq. Ca. Abr. 518. Co. Litt. 89 a. and 172 a. *Sed vide* Mr. Hargrave's note (1) to the former folio. But, with respect to powers, it was said by Lord Hardwicke, that there was no precedent either in a court of law or equity where it had been held, that a power over real estate executed by an infant was good, 3 Atk. 710. *Jackson v. Jackson*, 4 Bro. C. C. 462. *Hollingshead v. Hollingshead*, cited 2 P. Wms. 229; but minority may be expressly dispensed with by the author of the power. *Hearle v. Greenbank*, 3 Atk. 695. See also on the subject in general, *Sikes v. Lyster*, 5 Vin. Abr. 541. *Winde Ex parte*, Dick. 76. *Burton Ex parte*, Ib. 395. 540. 1 Pres. Abs. 319. Sugd. V. & P. 173. 5th edit.

Infant may surrender lease, present to benefice, and execute power, when.

From this period, after a successful operation of nearly 120 years, the act of parliament which forms the subject of this note, loses its familiar appellation of the "Seventh of Anne" for that of "the Sixth Geo. 4th." by which the 7th of Anne, and eight other acts are repealed, or rather consolidated into one. The frequent reference we shall have occasion to make to this act, renders a detailed account of it necessary to this treatise, and it may not be amiss to introduce it here, in an entire and connected but compressed form, rather than to dislocate it into its several sections as the subjects occur throughout the work. The act bears date the 27th June, 1825, and is intitled "An act for consolidating and amending the laws relating to conveyances and transfers of estates and funds vested in trustees, who are infants, idiots, lunatics, or trustees of unsound mind, or who cannot be compelled or refuse to act; and also the laws relating to stocks and securities belonging to infants, idiots, lunatics, and persons of unsound mind." It repeals the 7 Anne, c. 19., 4 Geo. 3. c. 16., 4 Geo. 3. c. 10., 1 & 2 Geo. 4. c. 114., 36 Geo. 3. c. 90.,

6 Geo. 4. c. 74.

Consolidated act relating to infant, lunatic, or absent trustees.

wise a *fême covert*, might convey by fine, under the last mentioned statute, the Master reporting it necessary; his Lordship said, that this question came before him soon after he had the seals, and that he consulted with Lord Chief Baron Comyns, who thought the court might order an infant, who was a *fême covert*, to levy a fine, for the act was general, that all persons

52 Geo. 3. c. 32., 52 Geo. 3. c. 158., 57 Geo. 3. c. 39., and the 1 & 2 Geo. 4. c. 15.

*Infant trustees
or mortgagees.*

The *second* section provides, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, [i. e. expressed, not *implied*, ante, 206.—*Ed.*] or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the Court of Chancery or Exchequer, to convey, release, surrender, assign, or otherwise assure such lands, hereditaments, property, estate, or interest to such person, and in such manner as the said courts respectively shall think proper and direct; and every such conveyance or assurance shall be as valid and effectual as if the said person, being an infant, were at the time of executing the same of the full age of twenty-one years."

*Trustees or
mortgagees
being idiots or
lunatics;*

By section 3, it is enacted, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be idiot, lunatic, or of unsound mind, it shall be lawful for the committee of such person, or any person to be appointed as after mentioned, in the name of such idiot or lunatic, by the direction of the Lord Chancellor, to convey, release, surrender, assign, or otherwise assure such lands, hereditaments, property, estate, or interest, to such person, and in such manner as the Lord Chancellor shall think proper and direct; and every such conveyance or assurance shall be as valid and effectual as if the idiot or lunatic had been at the time of sane mind, and had executed the same."

By sect. 4, it is provided, "that the Lord Chancellor, before inquisition found, may appoint a person to convey the estates of the idiot or lunatic trustee or mortgagee."

*or beyond sea,
or unknown.*

Sect. 5, enacts, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery or Exchequer, or it shall be unknown or uncertain whether he, she, or they be living or dead, or such person or persons shall refuse to convey, or otherwise assure such lands, hereditaments, property, estate, or interest to the person entitled thereto, or to a *new trustee* or trustees duly appointed by virtue of some power, or by the Court of Chancery or Exchequer, it shall be lawful for the Court of Chancery or Exchequer to appoint such person as to such court shall seem meet, on behalf and in the name of the person seised or possessed as aforesaid, to convey, surrender, release, assign, or otherwise assure the said lands, hereditaments, property, estate or interest, to such person and in such manner as the said court shall think proper and direct; and every such conveyance shall be

under age should convey and assure; and that a *fême covert* of full age could not assure, but by fine, the court might direct an infant *fême covert* to convey in the same manner in the present case (L).

as valid and effectual as if the absent or unknown person had by himself executed the same." [*Burr v. Mason*, 2 Sim. & Stu. 11.]

Sections 6. and 7. enable the Lord Chancellor to appoint a person to transfer stocks or funds standing in the name of a lunatic, or an absent or unknown trustee, and to receive and pay over the dividends as the court shall direct.

Sect. 8, provides, "that every direction or order of the Court of Chancery or Exchequer, or by the Lord Chancellor, under the authority of this act, shall be made upon petition;" and sect 9, provides, "that infants, idiots, lunatics, their committees or persons appointed as aforesaid shall be compelled to convey and transfer, as directed by the court." *Petition.*

By sect. 10, it is enacted, "that the several provisions thereinbefore contained shall extend to cases in which a trustee [not, or mortgagee] may have some beneficial estate or interest in the lands, hereditaments, property, stocks, funds, or securities vested in him, and also to cases in which the trustee may have some duty to perform, so as to enable conveyances and transfers to be made, in order to vest any lands, hereditaments, property, stocks, funds, or securities in a new trustee appointed in his place, by virtue of some power, or by the Court of Chancery or Exchequer, either alone or jointly with any continuing trustee or trustees, as the case may require." *Trustees under power having interest or duty to perform, authorised to convey to new trustees.*

The act is then directed to extend to petitions in cases of charity and friendly societies, and several other provisions are added chiefly respecting the transfer and management of stocks and money in the public funds.

And lastly, by sect. 17, it is enacted, "that the Court of Chancery or Exchequer may order the costs and expences of and relating to the petitions, orders, appointments, conveyances, or other assurances and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands, hereditaments, stocks, funds, and securities, or the rents, issues, dividends, and annual produce thereof, in such manner as the said court shall think proper." *Costs may be directed to be paid.*

(L) So in *Lombe v. Lombe*, Barnes, 217, and *Bowes Ex parte*, 3 Atk. 164, it was held, that an infant trustee or mortgagee may levy a fine; but it was considered doubtful whether he could suffer a recovery without a privy seal. Lord Hardwicke subsequently resolved this doubt by determining that an infant to whom a trust is descended, may under an order of the court, convey by a common recovery. *Johnson Ex parte*, 3 Atk. 558. The same was held by Lord Camden, in *Smith Ex parte*, Amb. 624; and a query was made by the reporter why a privy seal could be considered necessary, the statute empowering the infant to convey generally, and a common recovery being a species of conveyance. Et vide *Anderson Ex parte*, 5 Ves. 240. 243. In cases of this description, where an infant levies a fine or suffers a recovery under the statute to bar an entail of the trust, or to enable a *fême covert* to convey, the Court of Common Pleas dispenses with the usual affidavit as to infancy. *Infant may convey by fine or recovery, and affidavit dispensed with in C. B.*

1 Pres. Abs. 320. Et vide 1 Ridgw. 264.

In the last-mentioned case, there was only an affidavit of service on the husband, which his Lordship did not think sufficient, but directed it to stand over until the next day, that counsel might consent to the prayer of the petition for the husband, and the next day his Lordship made an order according to the prayer of the petition.

Infant, devisee, and executor, not allowed to convey.

Where an infant was devisee of, and also executor to, the mortgagee, the court would not order him to convey under the statute of 7 Ann. (l).

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Conveyance by infant heir of mortgagee, binding, without order of court, as mere form.

And in the case of *Zouch v. Parsons* (m), it was held, that a lease and release by an infant, who was one of the executors, and heir of a mortgagee, of the estate mortgaged, made to a subsequent mortgagee, in consideration of the mortgage-money paid in, was binding upon the infant, upon the grounds that the fee which was in him was merely as a pledge for the money, and that besides the money, the infant had no beneficial interest in the land whatsoever; upon payment, therefore, he was bound to convey as the mortgagor should direct, and, by the 7th of Anne, compellable to do it during his minority; that his conveyance was therefore a matter of form, and in the nature of an authority, executed by the mortgagor's direction, in favour of a third person, who ventured his money upon the faith of it (M).

(l) Vide *Sergison Ex parte*, 4 Ves. 147. [For the reasons stated in 206 a, note.—Ed.] (m) *Zouch v. Parsons*, 1 W. Black. Rep. 575. 3 Burr. 1794.

Order of court unnecessary, if infant consents to convey. (Qu.)

(M) Our author has added a note to this case in the Index, *vide* Infant, in these words:—"N. B. It is presumed that it follows from the last proposition, that an order under the statute of Anne is unnecessary where an infant is willing to convey without an application to the Court of Chancery." This, it must be allowed, would be a necessary consequence of the adjudication, if the case could be depended on. But the principle of the decision has been seriously questioned by Mr. Preston, both in his *Essay on Abstracts*, and in his *Treatise on Conveyancing*.

Mr. Preston's observations on Zouch v. Parsons.

In the latter work he observes, (2d vol. ps. 249. 250. and 367.) "No lawyer of eminence has thought it safe to follow the decision (in *Zouch v. Parsons*) in practice; and that excellent property-lawyer, the present Chancellor (Lord Eldon) has repeatedly approved the observations of counsel when questioning the authority of this case. To admit indeed that such a decision

And it being found that inconveniences frequently arose by lands mortgaged falling into the hands of idiots and lunatics, *Lunatic mortgagees empowered to con-*

is law, is to confound all distinctions, and to oppose all authority on this head. Though it has not been expressly over-ruled, the probability is, that whenever the point shall require an express and explicit decision, it will be determined, that a conveyance by lease and release, made by an infant, cannot, under any circumstance of interest or no interest, in the infant, or benefit or no benefit to him, be supported." And again in his Essay on Abstracts (1st vol. 224.) "This case (of *Zouch v. Parsons*) has never been acted on in general practice, and the decision is so objectionable in its principle, and appears so irreconcilable with the former determinations, or policy of the law, and the reasons assigned in support of the decision are so sophisticated, that its authority is highly questionable, and it has more than once been questioned; and it is reasonable to suppose that it would not be followed as a precedent for decision, except in a case exactly the same in specie and in circumstances. Indeed it would be difficult to support it even to this extent. No experienced conveyancer will accept a title under the authority of this decision."

The case of *Zouch v. Parsons* decided that the re-conveyance by deed of an infant mortgagee, under the direction of the mortgagor, should be considered as *voidable only*, and not absolutely void. In opposition to this determination, it is contended, that on the principles of the common law, every grant by an infant, which necessarily requires a deed, is *actually void*; and that therefore an infant cannot grant or transfer a rent, nor grant a reversion or remainder, nor make an attorney, nor as a consequence execute a conveyance by lease and release, because a deed is essential to the validity of a release; but that with respect to grants, which do not necessarily require a deed as the efficient means of passing the estate, as, for instance, a feoffment, which operates by livery, or a lease which is perfected by entry (*Shep. Touch. 267. Moor, 105. Plow. 545.*), such species of assurance by an infant will not be absolutely void, but voidable only; and it is said, that it would be a singular surprise on any well read lawyer, if an instance could be found where a grant by deed from an infant has been held to have had any effect whatever. To place the point in a fairer light, a comparison is made between a feoffment by an infant in person (which is voidable only, *Bro. Abr. Coverture, pl. 40. Ib. Infancy, pl. 1.*) and a feoffment by an infant through the medium of an attorney (which is absolutely void, *8 Co. 45 a. 9 Hen. 6. 6. Perk. s. 12. 13. 14. 2 Roll. Abr. 2.*) Upon what ground, it is asked, can this distinction proceed, if not upon the well known principle that an attorney cannot be appointed without deed? That the deed of the infant is void, and as a consequence the letter of attorney, and the feoffment founded on the same are actually void, and not merely voidable.

Reasons against that decision.

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It cannot be controverted but that previously to the case of *Zouch v. Parsons*, the distinction as to infants between deeds which were essential to the transfer, and deeds which were secondary to it existed, though the reason for that distinction is not very apparent. If it were a rule that an infant

Ground of that case reviewed.

could not grant by deed, it appears like a mere circumvention of the rule to hold that he may grant by feoffment, because the essential article in a feoffment is not the charter but the livery of seisin, or that he may make a lease, because the principal part of it is the entry of the tenant, and not the demise of the lessor. The true reason why a feoffment by an infant is voidable only, and not void, is, because the livery of seisin being formerly made before the *pares curiæ*, it was presumed they were competent judges of the feoffor's ability to make the feoffment, and would not permit him to execute it if they saw he was an infant. And as to leases, the reason why they are voidable only, and not absolutely void, is, because if rent be reserved they will be of benefit to the infant (for he cannot occupy the lands himself); and consequently if no rent be reserved, the leases will be absolutely void. *Ashfield v. Ashfield*, Latch. 199. And the ground from which the distinction as to void and voidable deeds original arose, was the protection which courts of law and equity deemed it expedient to extend to infants, and the broad criterion on which they formerly acted was to inquire whether the act of the infant were beneficial or prejudicial to him, if the former, it was held voidable only; if the latter, it was pronounced absolutely void; therefore, as Mr. Hargrave observes (*Harg. & Butl. Co. Litt.* 51 b. n. 3.), the court in *Zouch v. Parsons*, held the lease and release by the infant to be voidable only, "because the consideration of the conveyance, and other circumstances, shewed that the act was right and proper, and apparently not in the least to his prejudice." See *Ib.* 171 b. and generally 1 Roll. Abr. 728. 3 Com. Dig. 619. 8vo. edit. *Keane v. Boycott*, 1 H. Bl. 515. Cro. Car. 502. 1 Jones, 405. 3 Mod. 310. Stra. 94. *Hay v. Hook*, MS. Butl. Co. Litt. 246 a. n. (1). *Strickland v. Croker*, 2 Ch. Ca. 211. *Warburton v. Lytton*, 4 Bro. C. C. 440. and 1 Fonb. Trea. on Eq. 80. 5th edition.

Considerations
and authority
for adopting
Zouch v. Par-
sons.

It may perhaps be considered the height of temerity to suggest any observations derogatory to those which have been advanced by the most profound property-lawyer of the present day. But with the greatest deference it is submitted, that on an attentive consideration of the case of *Zouch v. Parsons*, and the ready applicability of many of the positions there adduced to the circumstances of modern times, although some of the arguments which it contains may seem sophisticated, yet the decision itself (unanimously concurred in by Lord Mansfield, C. J. and Wilmot, Aston, and Yates, Justices) ought not to be treated with levity. It is the standing determination, and till overruled must be considered as the law of the land. And it is very remarkable, that the present Lord Chancellor (who is stated so frequently to have questioned the case of *Zouch v. Parsons*) should have absolutely concurred in that adjudication, and even have extended the point still farther than that case carried it. In *Handcock ats.* ———, 17 Ves. 383. (where the subject of this note was expressly before the court) his Lordship, after observing that in *Zouch v. Parsons*, Lord Mansfield had held, that the conveyance of an infant trustee by lease and release was voidable only, continued, "It is true, that where an infant conveys as a trustee within the statute, not being so, he will not be bound by his conveyance under such an order; yet if it be a case in which he would be bound to convey when of age (*his conveyance being voidable only during his infancy, and until avoided passing the legal estate*), and no one having a right to elect for him whether it should be void or not, he would, when he became

in order to remedy them it is enacted, by the statute of the 4th Geo. 2. c. 10, that from thenceforth it shall be lawful for any person or persons, being idiot, lunatic, or *non compos mentis*, or for the committee or committees of such person or persons, in his, her, or their name or names, by the direction of the Lord Chancellor, or the Lord Keeper, or Lords Commissioners of the Great Seal, by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such person or persons, being idiot, lunatic, or *non compos*, shall be seised or possessed in trust, or of the mortgagor or the mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons, being idiot, lunatic, or *non compos mentis*, is, or are, or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, shall, by such order so to be obtained, direct to any other person or persons, and such conveyance or

vey by themselves or committees. [See the late act, *supra*, 207, n.]

adult, be placed in such a situation, that if he sought at law to avoid his deed a court of Equity would prevent him."

Hence, therefore, if an infant mortgagee, in whom an empty legal estate resides (of which he cannot possibly make a benefit, and consequently the conveyance of which cannot operate to his prejudice), if such an infant mortgaged convey by lease and release, without an order of the court (it is presumed), such conveyance *by deed* will not, in the present consideration of a court of Equity, be absolutely void, but *voidable only*; and further, that if the infant, on arriving at the age of majority, seek to avoid the instrument, on the plea of *dum fuit infra aetatem*, the Court of Chancery will interfere and prevent him. But it is to be observed, that this view of the subject does not supersede the necessity of resorting to the court for an order under the statute 6 Geo. 4; for the deed of the infant may, it seems, be avoided during infancy; and therefore, in all cases, it is most advisable, (at least in the present state of the question,) to petition the court for an order directing the infant to convey.

Practical conclusion.

This subject is also discussed in the preface to Mr. Bingham's Treatise on Infancy and Coverture; et vide also the observations of my Lord Chancellor in *Handcock Ex parte*, 17 Ves. 383. *Supra*, 206, n. as to any inconvenience arising from a dry trustee's execution of a conveyance before he is of age. It is observable however, that the Court of King's Bench in Ireland, adopting Mr. Preston's doubts, have lately held, that a bond by an infant is not merely voidable but absolutely void. *Hunter v. Agnew*, 1 Fox & Smith's Reports, 15.

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assurance so to be had and made, shall be as good and effectual in law, to all intents and purposes, as if the person or persons, being idiot, lunatic, or *non compos*, was or were, at the time of the making of such conveyance or assurance, of sane mind, memory, or understanding; or not idiot, lunatic, or *non compos mentis*, or had by him, her or themselves, executed the same. And that all and every such person and persons, being idiot, lunatic, or *non compos mentis*, and only mortgagee or mortgagees, or *non compos mentis*, and only such mortgagee or mortgagees, shall and may be empowered and compelled by such order so to be obtained, to make such conveyance or conveyances, assurance or assurances, in like manner as trustees or mortgagees of sane memory, are compellable to convey or assign their mortgages.

If petition entertained, when no commission has issued. Foreign proceeding sufficient.

The language of the last-mentioned statute being, that "all persons, being lunatic, or the committee of such persons, shall convey," Lord Hardwicke doubted (*k*) whether, on a petition grounded thereon, he could in general cases make such order, where no commission of lunacy was taken out (*N*). But in a case where there had been a proceeding before a proper jurisdiction, namely, the Senate of Hamburgh, where the lunatic resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the court was obliged to take notice of, his Lordship de-

(*k*) *Otto Lewis Ex parte*, 1 Ves. 298. [Et vide sup. 207, new act.—Ed.]

(*N*) The same doubt was thrown out in *The Marchioness of Annandale Ex parte*, Amb. 80; but it seems to be now settled, that a commission of lunacy must have issued before the court will entertain the petition, *Gillam Ex parte*, 2 Ves. jun. 588. Amb. 80; and the lunatic must be resident in England. *Sylva v. Da Costa*, 8 Ves. 316. In cases of this kind, the re-conveyance is made out in the name of the lunatic; but it is executed by the committee in his name and on his behalf. For more on this subject, and the subject in general, the reader is referred to Mr. Collinson's treatise on that head of law. By the 1st & 2d Geo. 4. c. 114, a conveyance may be directed of the estate of an idiot or lunatic, trustee, or mortgagee, before such idiot or lunatic shall have been found so by inquisition; over-ruling the conclusion from *Gillam Ex parte*, 2 Ves. jun. 587, stated in this note. Et vide 2 Watk. Cop. 85. This act, however, is now repealed, or rather consolidated, for which, see supra, 207, n.

clared that the person was a mortgagee within this act, and ordered that, on payment of the mortgage-money, there should be a conveyance to the mortgagor.

A mortgagee (l) has been determined to be a purchaser within the 27 Eliz. c. 4 (o). Thus, where A. and B. (m) were trustees in a term for ninety-nine years, for raising a sum of money, and C. who had the reversion, settled it upon B. and his heirs, in trust for his mother (who had conveyed it before to him) for her life, and after her death, if he survived her, then in trust for him and his heirs; but if she survived him, then to her and her heirs. Ten years after, A. lent a sum of money to C. having had no notice of this second conveyance to B. and took a mortgage of these lands to trustees; C. died, his mother surviving him. Then A. set up his mortgage, and exhibited a bill against the mother of C. and B. to set aside

Mortgagee a purchaser pro tanto, and voluntary settlement void against him.

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(l) *Chapman v. Emery*, Cowp. 278. (m) *White v. Hussey*, Pre. Cha. 13. [9 Mod. 396. Et infra, 638. 677. 974. Et vide *Warwick v. Kniveton*, 3 Atk. Ed.] 291.

(O) That statute declares, that all fraudulent, feigned, and covenous conveyances, &c. made to deceive purchasers, shall be void. The 6th section provides, that no lawful mortgage made or to be made *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of that act, but shall stand in the like force and effect as the same would have done if that act had never been made.

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continued.

Stat. 27 Eliz. c. 4. s. 6.

5. In the case in Cowper's Reports, where one after marriage made a settlement of certain premises upon himself for life, with remainder to his wife for life, with remainder to their issue in tail, and three years afterwards mortgaged the premises to B. who was told there was such settlement, it was held, that the settlement was voluntary, and void as against the mortgagee within this statute. *Chapman v. Emery*, Cowp. 278. So in *Doe v. Manning*, 9 East, 59, it was held that a voluntary settlement of lands made in consideration of natural love and affection, will be void as against a subsequent purchaser or mortgagee for a valuable consideration, though notice of such previous settlement be given to the purchaser or mortgagee before all the purchase or mortgage money be paid, or the deeds executed, and though the settler have other property at the time of such prior settlement, and do not appear then to be indebted, and although there be not any fraud in fact in the transaction; for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in a case of this nature, upon the construction of the statute. But where a father, at the request of his son, ex-

Settlement after marriage, or in consideration of love and affection, void against mortgagee with notice.

the former conveyance made by C. as being voluntary and fraudulent against him. And it was so decreed.

Mortgagee cannot bar mortgagor by fine and non claim.

A fine and non-claim by a mortgagee in possession (P), will not bar the equity of redemption (n).

Nor by recovery.

And the rule of equity (o) is the same in case a recovery be suffered by a mortgagee in possession; for after such recovery suffered, and until the money be paid, the estate, in a court of equity, is still but as a security for the money lent; and, after the mortgage money is paid, the mortgagee is, in equity, in nature of a trustee for the mortgagor.

(n) *Stowell v. Zouch*, Plowd. 373. *Holland v. Halton*, Carth. 414.—Ed.] 1 Vern. 132. *Welden v. Dux Ebor.* (o) *Stanhope v. Thacker*, Pre. Cha. Cruise on Fines, 233. [2 Cru. Dig. 435. Cro. Jac. 593. [Converse as to 117, et vide ante, 164, 5. Et vide mortgagor, ante, 164, 5.—Ed.]

ecuted a mortgage to secure a debt due from the son to the mortgagee, this was held not to be a voluntary conveyance without consideration. *Hearn Ex parte*, 1 Buck. B.C. 165. *Infra*, vol. ii. p. 655, 6.

Collaterals in marriage settlements are volunteers.

In *Cormick v. Trepaul*, 6 Dow. P. C. 60 (cited ante, 165 b, 6, note (N), which see), the counsel for the respondents referred to the case of *Johnstone v. L ———*, then lately decided, but the report of which did not appear when the last edition of this work went to press. It was in that case stated to have been determined, that when in a marriage settlement there are further limitations to collaterals, the ulterior limitations are voluntary, and are defeated by a subsequent sale or mortgage for valuable consideration; and notice of the settlement, according to the principal case and the whole tenor of the cases, will not make any difference.

The unreported case of *Johnstone v. L ———*, mentioned in this note, is stated in Sug. V. & P. 561. 570, 5th edition, by the name of *Johnson v. Lingard*, and reported fully, and the above statement confirmed, 3 Madd. 283. It must of course over-rule that part of *Pulvertoft v. Pulvertoft*, 18 Ves. 84, which held, that a limitation to brothers or other relations was within the scope of the settlement, and therefore not voluntary; et vide *Holloway v. Millard*, 1 Madd. Rep. 418. 2 Watk. Cop. 309, 4th edit. Ath. Sett. 183. Rob. Fran. Conv.

Text confirmed.

(P) So in the case of a grantee of a mortgagee, though he levy a fine, that will not discharge the equity of redemption, *Story v. Windsor*, 2 Atk. 631; and in *Kennedy v. Daly*, 1 Sch. & Lef. 380, it was said that a mortgagee could not by fine and non-claim bar the equity of redemption, for the fine displaced nothing; it was still the same estate. Et vide *infra*, note (Q), p. 335, for the effect of a fine by a disseisor of the mortgagee in possession, upon the mortgagor.

A mortgagee (p), if in possession, may gain a settlement by virtue of the mortgaged estate.

Mortgagee may gain parish settlement.

Accepting a mortgage does not estop the mortgagee from saying that the mortgagor had no estate in the premises mortgaged (q).

Mortgage not an estoppel.

Thus (q), in covenant, on mortgage, by the defendant to the plaintiff, to pay so much, seven years from the time of the mortgage made, and so much yearly out of lands in lease to I. S. breach was assigned, that the defendant had no estate to convey; the defendant, on oyer of the indenture, pleaded that I. S. was tenant for life, and that the defendant was seised of the reversion in fee sufficient to convey. To this the plaintiff demurred *et per curiam*. The indenture of mortgage was no estoppel, to say, in an action of covenant, that the defendant had no estate, though in debt for rent it is, *sed adjournatur*.

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Producing a bond or mortgage is (r), *prima facie*, good evidence of a debt; but, it should seem, it would not avail if there were manifest signs of fraud in the obligee or mortgagee; for, in such case, he ought to be put to the proof of actual payment (r); and though he may happen thereby to lose some

Production of mortgage evidence of debt, but payment must be proved if there be signs of fraud.

(p) *The King against The Inhabitants of Catherington*, 3 T. R. 771. [Et vide *Parker v. Manning*, 7 T. R. 537.—Ed.]
vide ante, 166, 7, note (p).—Ed.]

(r) *Piddock v. Brown*, 3 Will. 289.

(q) *Cordinglee v. England*, 3 Keb.

(Q) An estoppel is the preclusion of the rightful owner from asserting his title through some tacit admission of right, which he has acknowledged to be in the wrongful tenant. A mortgage must certainly be an estoppel *pro tanto*; for by accepting the indenture, the mortgagee would indubitably be precluded from denying the existence or validity of the mortgage. The plea of *nil habuit in tenementis* would be inadmissible on his part, or on the part of his heirs, executors, administrators, or assigns. But a mortgage would not estop the mortgagee from claiming the equity of redemption. The subject of estoppel is investigated in Bro. Abr. tit. Estoppel, among the earlier writers, and in the very learned and useful Essay on Abstracts (vol. ii. p. 205), among the modern authors.

Mortgage an estoppel pro tanto.

(R) Of this a scrivener's book of accounts (the scrivener being dead) will be good evidence. Per Lord Hardwicke, in *Smartle v. Williams*, cited in *Montgomerie v. Turner*, 1751, Bul. N. P. 283. Two unstamped slips of paper,

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part of the money really due to him for want of proof, this is but a just punishment for the fraud of which it is evident he meant to be guilty, and will be a proper discouragement to others from committing the like.

Mortgagee seven years in possession may sit in parliament; [and vote at elections, ante, 170 a, b.]

By the 9 Ann. c. 5, which requires that knights of the shire should have 600*l. per annum*, and every other member 300*l. per annum*, it is enacted, "That no person shall be qualified to sit in the House of Commons within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other person, *unless* the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of his election" (s).

with "I O. U. 400*l.*" and "I O. U. 250*l.*" written thereon, are neither promissory notes nor receipts, and therefore may be received in evidence on an assumpsit for money lent. *Childers v. Boulnois*, 1 Dow. & Ry. N. P. C. 8.

Mortgagee no right to shew title deeds.

(S) It merely remains to add, in the conclusion of this chapter, that the mortgagee has not any right to shew the title of his mortgagor. Thus, where two were tenants in common, deriving title under the same settlement, and one sold his share, but retained the settlement as a mortgage for part of the purchase money unpaid, on a motion against him by the other tenant in common for production of the settlement, the Chancellor said the estate belonged to a purchaser, and the defendant was nothing more than a mortgagee, and a mortgagee had no right to shew his mortgagor's title. The reverse of that rule would be attended with very dangerous consequences to the security of property. *Lambert v. Rogers*, 3 Metiv. 489. Nor can be compelled so to do. *Pindar v. Smith*, 6 Madd. 48.

As to a mortgagee in possession, see *infra*, 946.

CHAP. IX.

OF THE OBLIGATION OF A MORTGAGOR (A), &C. TO SEE TO
THE APPLICATION OF HIS PURCHASE-MONEY.

THERE is no circumstance attending the alienation of property, either absolutely or by way of mortgage, that so frequently *Subject proposed.*

(A) This, it is apprehended, should have been MORTGAGEE; for a mortgagor cannot well be considered as a purchaser, nor will he in any instance be bound to see his money applied to the purposes for which the mortgagee may have bequeathed it; for a hand being appointed by law to collect and get in the personal estate, and as part of it the mortgage money, a good and sufficient receipt and discharge for the same can be given to the mortgagor (vide post, 219. 662); but if the mortgagee shall have expressly devised both the estate in mortgage and the money due thereon to certain trustees and their heirs, and shall have omitted to add (and which in fact it was not necessary to add) a clause that the receipts of the trustees should be good discharges to the mortgagor, yet the mortgagor must pay his money to the executor, for there may not be enough personal estate without it to pay the debts; and even if the executor has assented to the bequest, the executor should be a party to the deed re-conveying the estate to the mortgagor, and he should join in giving a receipt for the mortgage money. It is, however, observable, that where a mortgagee in possession assigned the debt and estate to trustees for payment of scheduled debts, and the purchaser objected to the title on the ground that he was bound to see his money applied, the Vice Chancellor seemed to be of that opinion, but his Honour removed the objection by referring to the generality of the power which he said was equivalent to an exonerating clause. 2 Madd. Rep. 239. Post, 241, 2, 3, 4, *in notis.*

Mortgagor never liable to see money applied.

The preceding observations, however, must be confined to cases where the mortgagee has bequeathed the money on trusts and appointed an executor, or died without a will, whereby the right to the money devolves on the administrator. If the mortgagor have notice that the money borrowed is settled on certain trusts by a particular deed, he certainly will be bound in equity to see to the application of his money on paying it in, unless he be expressly or impliedly exempted from that obligation by a provision in the trust deed. It is therefore essential to prevent the mortgagor from acquiring any knowledge of the trust. If however such knowledge transpire, and there is not any indemnity clause in the trust deed, or the trusts are not of a nature to free him from the liability of seeing his money applied, the mortgagee cannot be advised to pay off the money without the sanction of a court of equity. If the trustees file a bill to be redeemed or foreclose, the mortgagor, it is presumed, would be allowed or directed to pay the money into court.

It has lately been ruled, that an authority given by a testator to his trustees to lay out money on security, includes in it an authority to give sufficient receipts to the borrower. *Wood v. Harman*, 5 Madd. 368.

quently occasions difficulty and delay to the parties, as that which arises from the necessity of seeing to the application of purchase-money; it will not therefore, I trust, be thought digressive from the subject of this essay, to attempt an investigation of the degree and extent of this obligation.

Charge of debts generally, exonerates purchaser; contra, if raising them depends on contingency.

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This question, as to the seeing to the application of purchase-money, seems first to have occurred between an heir at law and a purchaser under a devise for the payment of debts generally, without the intervention of any trustee for the purpose. And it was held, that if lands be directed to be sold or disposed of, for the payment of debts generally, the purchaser is not, as against the heir at law, or persons entitled to the lands after the debts discharged, obliged to inquire into the account of the debts, to ascertain whether sufficient has been previously raised for their payment; but if lands be not *absolutely* liable to the payment of debts, but only on *some contingency or condition*, as "if all the owner's debts cannot be paid out of his personal estate, or the rents and profits of his lands," it behoves the purchaser to inquire if the debts are satisfied; as in such case, if the fund first appropriated be sufficient, or if the fund charged in aid has been incumbered to the extent to which it is subjected, the lands will be discharged, whatever misapplication there may have been of the money (B).

Power to executor to sell realty, in aid of personalty, purchaser should see that personalty is deficient.

(B) The same point was decided in *Dicke v. Ricke*, 15 Vin. Abr. 419, pl. 9. (S. C. Cro. Car. 335, pl. 21. Jones, 237. 328, pl. 9. and 1 Roll. Abr. 329, pl. 9. Post, 237, 8.) The testator there devised, that if it appeared that his personal estate should not be sufficient to pay his debts, then B. his wife, (who was tenant for life, and executrix) should have power to sell so much of the land as would pay the debts. And it was held, that B. could sell but so much of the land as would suffice to pay the debts; consequently, that the debts must be first ascertained, and the value of the personal estate shewn, before a sale could be made; and a purchaser buying the estate before the deficiency of the personal assets was computed, bought it at a risk that such deficiency would be of equal amount with his purchase money; for all beyond that deficiency belonged to the person entitled to the inheritance. Accordingly, by the report in Jones, it was held, that as the power was given on a precedent condition, there ought to have been a sufficient averment of the performance of that condition [otherwise the power did not arise]; and the widow ought to have set forth how much the debts were, and how much the goods were, &c.

But it was held, in the case first mentioned, that if the heir at law, or other person entitled to the lands, attached his claim by filing a bill in Chancery, then whoever purchased after the bill *lite pendente* purchased at his own peril. *Purchaser, after bill filed, purchases at his peril.*

These points seem to have been agitated in the 21st year of the reign of King Charles the Second, in the case of *Culpepper v. Aston* (a). That case arose on a devise by a testator in the year 1642, whereby the testator gave to his daughter R. 1000*l.* to be levied out of monies due from his Majesty from the wardships of P., &c. and the residue thereof for his son T. and directed that, *for payment of his debts*, his lands in P., &c. *should be sold by his executors*; and his meaning was, that if all his debts and the said 1000*l.* might be raised as aforesaid, out of the rents and profits of his land, tenements, and hereditaments, then his lands in P., &c. should be conveyed to his son T. and his heirs; and the testator made N. C. and H. C.

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(a) 2 Ca. Chan. 115. 222.

that the court might judge whether the condition was really performed or not.

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continued.

It is here, however, necessary to apprise the student that a distinction exists in these cases between a mere power given to trustees or executors to raise as much money by sale of the real estate as the personal estate shall prove deficient in paying the debts and legacies of the testator, and an actual estate devised to trustees for that purpose. In the former case the power (as the preceding observations evince) does not arise, unless the personal estate be actually deficient; that circumstance, therefore, is essentially requisite to the valid execution of the power, and the purchaser or mortgagee must at his peril ascertain the deficiency (the evidence of which he should always keep in his possession to substantiate his title); and he must do this notwithstanding the trust be for payment of debts generally, or the will contain a clause that the receipts of the executors or trustees shall be good discharges, or that the purchaser or mortgagee shall not be bound to see his money applied. In the latter case, the prevailing opinion of the profession is (for there is not any express authority deciding the point), that the purchaser or mortgagee will not be bound to inquire whether the real estate were wanted or not. Butl. Co. Litt. 290 b. s. xiv.

Contra, if lands be expressly devised.

From this view of the subject it will be always advisable to add a clause to the trust empowering the trustees to sell, not only that the purchaser or mortgagee shall be exonerated from seeing to the application of his money, but also that he shall be discharged from the obligation of inquiring whether the personal estate has been collected and applied, or whether the money advanced is wanted for the purposes of the trust.

his executors; and three or four days after, he by lease and release conveyed the lands in P., &c. to N. C. and H. P. to pay his debts, and died. T. who was his heir at law, exhibited his bill to be relieved, and to have the land in P. supposing there was sufficient to pay all without sale of P., &c. Cross bills were exhibited. Three points appear to have been decided material to the present question.

Heir entitled after debts paid.

1st. That *when* lands are appointed or conveyed to pay debts, the heir is entitled to have the lands after the debts paid.

Purchaser under trusts to sell, and pay debts generally, not obliged to attend to sufficiency or insufficiency of land sold.

2dly. That a purchaser buying the lands, under such general appointment or conveyance, is not concerned whether there be sufficient or not; and if he buy and pay, though there be sufficient to pay the debts, yet he shall hold the lands against the heir, and the heir must take his remedy against the trustee. And so if the matter rest in account between the heir and trustee, his purchase is safe, though the money be mis-spent by the trustee.

Contra, *litis pendente*, between heir and trustee for account; for if debts were paid there was no occasion for sale.

3dly. That *lis pendens* between the heir and trustee to have an account, is sufficient notice in law without actual notice of the suit (c); so that if he purchase, it is at his peril. Though if in the event of that suit, it falls out that the debts were paid when he purchased, or that there was sufficient of his personal estate to pay his debts without sale, the heir will recover against the purchaser; but if it falls out that there was a necessity to sell them, then the purchaser is safe. But such dependence of suit must be real and not collusive.

Another report of Culpepper v. Aston.

The same case is again reported by the same reporter (b), and the will stated thus: Sir T. C. by his will, dated 29th February, 1642, devised, that if all his debts might be paid out of his personal estate, or out of the rents and profits of his lands, then his trustees, *who he recited*, to be estated in his lands in trust, should convey his lands to his son at his age of

(b) 2 Ca. Chan. 221. 21 Car. 2. this reign are dated from the year [The statutes and law proceedings of 1648-9.—Ed.]

twenty-one years, and receive the profits in the mean time, and made them executors, and died. It is further stated, that the bill was exhibited by the son, in 1655, but was not prosecuted for many years, and that it was grounded on the will, which, in truth, *was revoked* by the deed made in the March following, whereby the lands were conveyed to the trustees and their heirs to sell, to pay the testator's debts; for by the will the executors had only an authority to sell, and that of two parts; by the deed they had the estate not only of two parts, but of the whole; and there were other variances in the trusts limited in the will and in the deed. That another bill was exhibited in 1660, and a third bill afterwards. A stranger who had notice of the deed, but was not acquainted with the will, had purchased the estate. And it was conveyed to him by lease and release, in 1661, for a full consideration; and the purchaser was a party to the last bill. The cause was heard before Lord Chancellor Ashly. And it is stated that divers things were agreed and resolved.

1st. That by the trust in the will to sell, the purchaser did purchase *at his own peril*, if the personal estate and profits of the land received were sufficient, and afterwards became insufficient.

2dly. But if the trust were as in the deed, the purchaser was safe; for the vendor was liable, not the purchaser. If the conveyance were *to sell to pay debts*, it pertained not to the purchaser in such cases to inquire if the debts were satisfied, *especially* when no schedule of debts was made to ground his inquiry on, *else no such trust could ever be executed*.

First trust to pay debts generally, purchaser exonerated.

3dly. But in this case the heir (who was entitled to the lands after sufficient was raised, to have the lands by a trust implied, and a trust resulting on construction of the trust, though not expressed) did attach his claim by exhibiting his bill, and then no man might purchase after the bill *lite pendente*. And when the bill was exhibited against the trustee, it would bind him and all claimants under him *pendente lite*.

Purchaser bound to see his money applied in payment of scheduled debts, but not prejudiced by more being sold than sufficient to pay them; for in most cases charges of trust are to be paid also.

If a trust be created for the payment of *scheduled debts*, the purchaser is not concerned to see that no more is sold than what is sufficient to pay the debts (c). Thus, where S. the plaintiff's father, did, in April 1666, convey several manors and lands to B. and C. deceased, and E. and their heirs, until they had raised by sale or profit sufficient to pay the debts *in a schedule* to the deed of trust annexed, amounting to 1061*l.*, and also to pay 1500*l.* to D. in case he conveyed an estate according to articles made between him and S.; and after payment of the debts, and the 1500*l.* and all charges relating to the trust, the trustees were to stand seized of the remainder of the lands unsold to the use of the testator's son in tail, with remainders over. The trustees entered and undertook the trust, and sold to E. and F. certain part of the lands for 1500*l.*, and to certain other persons other parts for 772*l.*, and so raised by sale, in all, 2272*l.*, and afterwards they conveyed other lands to K. and L., which was mentioned to be in consideration of 840*l.*, but no money was actually paid, and the conveyance to them was only *in trust* for B. (the trustee); and as touching the 1500*l.* to be paid to D. he could not make a good title, and so the purchase was broken off; and instead of paying the 1500*l.* for him, there was a decree made, in 1672, that D. should pay to the trustees 800*l.*, being part of the purchase-money that S. had advanced in his life-time, which 800*l.* was accordingly paid; so that the trustees had received 3275*l.*, whereas the *schedule debts* amounted but to 1061*l.*, and the receipts and payments were all indorsed on the deeds of trust; and after this B. (the trustee), in 1679, owing 200*l.* by bond to R. he lent him 200*l.* more, and thereupon B. and K. and L. (his trustees) made a mortgage to R. of the lands conveyed to them in trust for B. for securing the 400*l.* and interest, and delivered to him the deed of trust, by which he had notice that the trust was only for payment of the *schedule debts*, which amounted but to 1061*l.* and the 1500*l.* to D., and had also notice, by the indorsements, that the trustees had raised by sale before the conveyance to K. and L. 2275*l.*; but it did not thereby appear whether D.'s 1500*l.* was to be paid or not.

(c) *Spalding v. Shalmcr*, 1 Vern. 301.

R.'s mortgage was held to be good (E); for, *per Curiam*, if more be sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account; and the trustees cannot sell just so much as is sufficient to pay the debts; and it was observed that the trust was not only for the payment of debts, but also to pay the trustees their costs and charges. It was then said for the plaintiff, that 200*l.* of the money, on R.'s mortgage, was not advanced upon account of the trust, but was a debt owing by B. (the trustee), and therefore ought not to be charged on the trust estate. *Sed non allocatur.* [219.]

But it seems that if trustees, for payment of debts and legacies, once raise money sufficient for the purpose, the creditors and legatees have no farther lien on the lands; but if the monies be misapplied, they must resort to the trustees for their satisfaction. Thus, where a man limited an estate to trustees for payment of debts and legacies (d), the trustees raised the whole money, and the heir prayed to have the land, and this was opposed, because the trustees had not applied the money, but converted it to their own use, so that the debts and legacies remained unpaid. But it was resolved that the heir should have the land discharged, and the legatees should take their remedy against the trustees, for the estate was debtor for the debts and legacies, but not for the faults of the trustees, and therefore was only liable so long as the debts, &c. should or might be paid; and where the land had borne once its burthen, and the money was raised, it was discharged; and the trustees liable.

Land having borne its burthen, creditors and legatees have no farther lien, though trustees mis-apply fund.

It appears also to be a settled rule, that if lands be conveyed, devised, or appointed, to be sold or disposed of, for

First trust to pay debts generally, purchaser discharged.

(d) *Anon.* Mich. 1689, in *Domo Procerum*. Salk. 154, pl. 1. [Cited by Mr. Hall, and recognized by Baron Graham, in *Omerod v. Hardman*, 5 Ves. 736, though that case may be considered as over-ruled, 6 Ves. 654, n.—Ed.]

(E) And the Lord Keeper (Guilford) said, that where lands are to be sold for payment of particular debts, the purchaser must take care to see his money rightly applied; and if the debts are not paid, that is such a breach of trust as will affect the purchaser. Vide Report, 1 Vern. 305.

Payment to executor enough.
S. P. 217. 225.

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the payment of debts *generally*, whether the trust be effected through the medium of a direct conveyance to trustees to pay debts, or by way of charge, or of power, the purchaser or mortgagee is not bound to see to the application of the money; the lands are discharged on payment of the money into the hand the law appoints to receive it, and the persons beneficially interested therein must, if there be any default in the application, take their remedy against the persons receiving the money. The earliest case that I have met with, in which this question directly occurs, is that of *Elliott v. Merryman*(e), although there are previous dicta to that effect in the preceding cases. But the rule is stated in this case, as universally acknowledged, in respect of lands given to be sold for payment of debts; and the case of a *charge* is thereby adjudged to fall *within the same principle*.

"I will that my debts be paid, and I charge my lands with the payment of them," this authorizes a sale, and purchaser not bound to see his money applied (F).

In this case, A. being indebted to several persons by bond, and likewise by simple contract, made his will, and in the beginning of it said, "my will is, that *all my debts be paid*, and I do charge all my lands with the payment thereof;" then came the clause upon which, together with the other circumstances of the case, the present question was determined. "*Item*, I give all my real and personal estate to B. to hold to him, his heirs, executors, administrators, and assigns, *chargeable* nevertheless with the payment of all my debts and legacies;" of this will he made B. executor. The testator died in 1724; B. proved the will, and in that year sold a freehold estate, and

(e) Barnard, Rep. Eq. 78. 1734.

Charge of debts generally same as devise for that purpose.

(F) It was formerly thought otherwise. In an anonymous case in Moseley, (p. 96, and see *Newell v. Ward*, Nels. Ch. Rep. 38), it is laid down that a purchaser shall be bound to see to the application of his purchase money if the debts be only charged on the estate; but Lord Camden, C. was of a different opinion in *Walker v. Smallwood*, Amb. 676, 686, cited post, 224. And the present Lord Chancellor Eldon, in a note to *Jenkins v. Hiles*, (6 Ves. 651, n.(a)) is reported to have said, that it had been long settled, that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser would not be bound to see to the application of his money; it was just the same as if the specific bequests were out of the will.

afterwards sold several estates, both freehold and leasehold, This will was recited in the purchase deeds, and to one of them a creditor of the testator's was a subscribing witness. The lands were sold in the neighbourhood by outcry. At the time of the sales *the creditors* lived in the town where B. lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly receiving their interest of B. B. was a solvent man till 1732, and then he became a bankrupt. In 1734 the creditors filed a bill against the purchasers of the lands, the executor, and the assignees under his commission, in order to have a satisfaction of their debts out of these lands, which were sold by B. And his Honour was of opinion that they were not entitled to relief. He said it was true that the words in the will did not amount to a devise of the lands to be sold for payment of debts, and only imported a charge upon them for that purpose. However, this was such a devise as was within the meaning of the statute of fraudulent devises; and interrupted the descent to the heir at law. His Honour, after considering the case as to the leaseholds, said, he would consider the other sales upon the general rules of the court. The general rule was, that if a trust directed land should be sold for the payment of debts, generally, the purchaser was not bound to see the money was rightly applied. On the other hand, if the trust described *that lands should be sold* for the payment of *certain debts*, mentioning in particular *to whom those debts were owing*, the purchaser was bound to see that the money was applied for the payment of those debts. The present case, indeed, did not fall within either of those rules; because here lands were not given to be sold for the payment of debts, but were only charged with such payment (f). However, the question was, whether that cir-

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General rule as to general and scheduled debts.

(f) Vide *Newman v. Johnson*, 1 Vern. 45, one devised "My debts and legacies being first deducted, I devise all my estate, both real and personal, to I. S." and held by the Lord Chancellor, that this should amount to a devise to sell for payment of his debts (F 2).

(F 2) Et vide *S. P. Shallcross v. Finden*, 3 Ves. 736. In *Clifford v. Lewis*, 6 Madd. 33, a testator began his will thus:—"I will and direct that my just debts, funeral and testamentary expences, be paid and satisfied," and then proceeded to dispose of his real and personal estate. On this a question

cumstance made any difference? And his Honour was of opinion that it did not. And if such a distinction was to be made, the consequence would be, that whenever lands were charged with the payment of debts, generally, they could never be discharged of the trust, without a suit in that court, which would be extremely inconvenient. No instance had been produced to shew, that in any other respect the charging lands with the payment of debts differed from the directing them to be sold for such a purpose, and therefore there was no reason that there should be a difference established in this respect. The only objection that seemed to be of weight, with regard to this matter, was, that where lands were appointed to be sold for the payment of debts, generally, the trust might be said to be performed *as soon as the lands were sold*; but where they were only charged with the payment of debts, it might be said that the trust was not performed *till those debts were discharged*, and so far indeed was true, that where lands were charged with the payment of annuities, those lands would be charged in the hands of the purchaser, *because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund*; but where lands were not burthened with such a *subsisting charge*, the pur-

Lands made a fund for annuity, must continue so in the hands of purchaser (G).

arose, whether the expression with which the testator had commenced his will, imported a general and primary purpose that the payment of his debts, funeral and testamentary expences, should precede the subsequent dispositions which he made of his property. The Vice-Chancellor, in delivering his judgment, observed, that in *Finch v. Hattersley*, the will began thus:—"First, I direct that my debts, &c. be paid." In *Lee v. Warrington*, "Imprimis, I direct my debts to be paid." Both these wills, his Honour thought, might be read thus:—"In the first place I direct my debts to be paid." The testator, in the case before him, had in fact in the *first place* directed his debts to be paid, and therefore the Vice-Chancellor could not attribute to this testator a different intention, because in the form of a different expression he had not remarked that it was in the first place. 6 Madd. 33, where the leading cases on the subject are cited.

To exonerate lands from charge of annuity, purchaser must see his money applied in payment of debts. Semb.

(G) In the case of *Wynn v. Williams*, 5 Ves. 135, the question was, whether if there be a general charge of debts followed by the bequest of an annuity, the purchaser would be liable to see his money applied? And it was argued at the bar, that as the estates in question were, under the will, liable to debts, *non constat* but that the purchase money of the defendant might have been applied to the payment of the debts, which were paramount the annuity. And if the purchase money were so applied, the defendant had a right to consider

chaser ought not be bound to look to the application of the money, *and that seemed to be the true distinction.*

The subject again occurred in the case of *Smith v. Guyon* (g); there the testator ordered *his copyhold estate to be sold*, and the money arising therefrom to go into the mass of his personal estate, and then ordered his personal estate (*subject to his debts*) to be divided into four parts, one fourth part to A. [another fourth part to B.—*Ed.*] and the remaining two fourth parts to secure the payment of certain annuities given by the will. The question was, whether the purchaser was bound to look to the application of his purchase money. *Et per* Lord Chancellor Thurlow, the purchaser is a mere stranger, and is not bound to look to the application. Where the estate *is to be sold* and a specific sum, as 5*l.* to be paid to A., the purchaser must see to the application; *but where it is to be sold generally*, he is not.

But if lands are to be sold, and money appropriated for securing annuity, purchaser exonerated (H).

*Estate to be sold, and 5*l.* paid to A. purchaser must see it paid; contra if to be sold generally.*

The same general doctrine had been laid down by the late Sir Thomas Sewel, when Master of the Rolls, in a case of *Tenant v. Jackson*, and *Cotton v. Everall* (h), the 10th of February, 1774, and he cited in support of it, *Langley v. Lord Oxford*, the 11th of May, 1748; it was also adopted by Lord Kenyon, upon a re-hearing of the last cause (i).

(g) 1 Bro. Ch. Ca. 186.

(h) 1 Bro. Ch. Ca. 186, n. t.

himself discharged. But the Master of the Rolls said he could not enter into that without a very burthensome account of all the estates of the testator; what part was sold; their value; the application of every sum paid by the devisee of the estates in exoneration of the debts of his father (the testator); to see whether the defendant could avail himself of that point, which, from certain letters produced in the cause, his Honour could hardly suppose; he believed those debts were discharged by the devisee; therefore he did not think the defendant had a right to call for an account, which he believed would not be to his advantage, and would be attended with an enormous expence; he would not direct an account then, but would hear the defendant's counsel on it, if he choose; upon which the defendant gave up the point.

(H) That is, from any farther liability than seeing his money invested in a fund of sufficient durability, for the regular payment of the annuity, such as in government or real securities.

(I) For these cases of *Tenant v. Jackson*, *Cotton v. Everall* or *Eberall*, and *Langley v. Oxford*, and other manuscript cases, see the Third Volume.

*Reasons for
above general
rule.*

The reason on which this rule is founded, is given in the second resolution, in the case of *Culpepper v. Aston*, before-mentioned, as it is reported, 2 Chan. Ca. 221, and more forcibly in the case of *Elliott v. Merryman* (i), namely, "that otherwise the lands could never be discharged of the trust, without a suit in Chancery, *which would be extremely inconvenient.*" "It is a resolution in support of the trust, that the estate may be sold (k)."

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But the above rule admits of several exceptions.

*Devise to A.
subject to debts,
who mortgages
to creditor, lat-
ter not allowed
to retain lands
for his old debt
(x).*

Thus, in the case of *Ithel v. Bean* (l), which was a devise of lands by a father to a son, *subject to the payment of debts*, a question arose, whether a creditor, to whom the son had mortgaged these lands, should retain them by way of security for his own debt, as well for the old debt as for the money lately advanced. Lord Hardwicke admitted the general rule above stated, where no schedule of the debts, but said this rule was never carried so far as to put it in the power of the devisee in trust, or the heir at law, who, in the Court of Chancery, is considered as a trustee, to favor one creditor, which would be the consequence if this was allowed. And his Lordship allowed the mortgagee the principal and interest of the money he advanced to the son, but said, as to his old debt, he could not be put in a better condition, but must come in *pari passu* with the rest of the creditors. And his Lordship distinguished this case from that of an executor, who, having power to administer the assets, and the legal estate in him, may sell a term, and the vendor retain it, and this even to satisfy a debt of his own: but *that was owing to the legal power of the executor over the assets*, upon which the court would not break in.

*Executor may
sell a term for
his own debt
(L).*

(i) *Supra*, 220.

(l) 1 Ves. 216. 1748. [S. C. 1 Dick.

(k) Per Lord Hardwicke, in the 132.—Ed.]
case of *Lloyd v. Baldwin*, *infra*, 227.

(K) This case does not seem much in point.

(L) *Secus* if the purchaser or mortgagee collude with the executor, 2 Vern. 616; and see the subject amply discussed in a preceding note, page 102, note (P).

And in the last case, Lord Hardwicke said, that it had never been held, that if a devisee in trust mortgaged to a creditor of his own, for satisfaction or security of that debt, such mortgagee having notice of the trust, should retain the estate against the creditors under that trust; or if he mortgaged, with notice, by way of securing the debt of the testator, it altered not the case; for the estate was a security in the hands of the trustee before, and it only operated to change the course, which the court would not suffer the trustee to do, considering it as a fraud to give the preference to one creditor, which the law had not established, nor would that court allow.

Devisee in trust, mortgaging for his own debt, mortgagee cannot retain lands for debt due from testator.

Another exception to the last rule is, where the trustee or heir, or person to sell or dispose, is called upon in a court of equity to execute the trust; for thereby the execution of the trust is taken out of the hands of the trustee to be executed by the court.

Though general charge of debts exonerates purchaser from seeing his money applied before suit by creditor for payment, yet it does not after.

A. devised his estate to his son B., charged with the payment of debts (*m*). B. afterwards made his will, and devised to C. his wife, charged with the payment of his debts. A bill was filed (*n*) by bond creditors of A. and B. for satisfaction of their debts out of the personal and real estates. B. having mortgaged part of the estate to L., he was made a party; and after he (L.) and C. had put in their answer, they joined in a sale of the estate to Y. One question was as to the validity of the sale *pendente lite*. It was argued for the plaintiff, from the inconvenience of the creditors bringing such a bill, if the trustee could sell after bill filed. It was said, that the execution of the trust, upon filing the bill, was in the hands of the court, and that the trustee had submitted to it by her answer. On the other side, it was contended, that no such inconvenience would arise, but rather an advantage, to the creditors, by having an early and less expensive sale than under a decree, and before a Master. That if the sale was unfair, that would be a sufficient ground to set it aside, but none other would. That such a sale, before bill filed, would be binding upon the general creditors, and ought to be so after

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(*m*) 1768.

(*n*) *Walker v. Smallwood*, Amb. 676.

bill filed. That the court permits many transactions to alter people's rights after bill filed, as third incumbrancers, to bring in a first incumbrancer. *Sed per* Lord Camden, Chancellor. This is a very material case in point of precedent. The question is, where there is a bill by creditors for sale of an estate to pay debts, and all the parties have put in their answers, and *submitted to the jurisdiction*, whether the heir at law, or devisee, can sell without the privity of the court or the creditors? The creditors have a right to call on the heir, or devisee, to execute the trust; and though this court has established it as a rule, that *where the charge is general*, the purchaser is not bound to see to the application of the purchase money; yet if the trustee is called upon in this court, it takes the execution of the trust out of the hands of the trustee to be executed by the court. The trustee has, by her answer, submitted to a sale in this court. She has parted with the execution of the trust to the court; and where the court has attached its jurisdiction, it would be inconvenient to permit a sale but by the court. Though a general charge does not make a purchaser, before the suit, see to the application of the money, yet after a suit commenced, *I should hold him bound to it*; and I hold it as a general rule, that an alienation pending a suit is void.

Sale pendente lite void (M).

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Devise to sell,
and pay debts
and legacies,
purchaser exonerated, (and consequently not answerable for money embezzled by trustees);

Where lands are devised or appointed for the payment of debts generally, the rule I have first stated will apply with equal force, although the estate be charged with, or subject to, the payment of particular legacies. Thus, where A. surrendered his copyhold (o), and devised his real estates to trustees, to sell and pay his own and his father's debts and legacies, the residue to his two sisters (p). No particular debts were specified in the will, but legacies to the residuary devisee and others to a considerable amount were given by both of their wills. The trustees sold great part of the estates, and embezzled the money, without discharging the debts and legacies.

(o) *Rogers v. Skillicorne*, Amb. 188. 1753.

(p) *Ibid.*

(M) If there has been a conveyance, it should seem that the legal estate, will have passed, although the sale may be avoidable in equity. *Et vide infra*, 541. 548.

The rest of the estate was possessed by one of the residuary devisees. The bill was by plaintiffs, as purchasers of several parts, to be indemnified against the debts and legacies by the estate remaining unsold, which was prayed by the bill to be sold for that purpose. *Et per* Lord Hardwicke, Chancellor, where there is a trust or devise for payment of debts generally, a purchaser is not obliged to see to the application of his money, as he is where there is a schedule or *particularising* of the debts. In this case the subjecting the estate to the payment of legacies will not make the purchaser answerable for the disposition of the money, because the legacies cannot be paid without the debts, and they are not specified. The above general rule has an exception (*q*), where there is a collusion between the trustee and the executor. I should have dismissed the plaintiff's bill with costs, if the defendants had made the proper defence; but instead of insisting on the above rule, they have insinuated collusion between them and the trustees. Therefore decree plaintiffs to hold and enjoy against the defendants.

So in the case of *Jebb v. Abbott*, in Chan. 9th Feb. 1782 (*r*), it was held, that where debts and legacies are charged on lands, the purchaser holds free from the claims of the legatees; for not being bound to see to the discharge of debts, he cannot be obliged to see to the discharge of legacies, which cannot be paid till after debts. The present Lord Chief Justice of the King's Bench assented to this position, and said it had been determined by Lord Hardwicke.

for, not being bound as to debts, which must be paid first, he cannot be bound as to legacies.

Again, in *Benyon v. Gibbs*, in the Sittings after Hil. Term, 1788 (*s*). The testator had charged his estate with the payment of his just debts generally, and with a legacy of 800*l*. for his daughter for life, and after her death for her children. The trustee had joined in a conveyance of part of the estate

Same law.

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(*q*) 2 Vern. 616.

(*r*) Cited by Mr. Butler in his note on Co. Litt. 290, 14th edit. [Butl. Co. Litt. 290 b. n. 1. s. xiv. 3.—*Ed.*]

(*s*) Cited by Mr. Butler in his note on Co. Litt. 290, 14th edit. [*Benyon v.*

Gollins, Butl. Co. Litt. 290 b. n. 1. s. xiv. 3. Stated erroneously, 2 Bro. C. C. 323, and 2 Dick. 697. A more correct statement may be found in 1 Sch. & Lef. 259.—*Ed.*]

to a purchaser, and permitted the 800*l.* to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchaser of the estate, and against the trustee. It was dismissed (*ss*) against the purchaser, on the ground, that as there was a general charge of debts, the purchasers were not bound to see to the application of the purchase money.

Money raised by act of parliament for particular purpose, person advancing it must see it applied.

Where money is raised under the sanction of an act of parliament by mortgage, for a particular and express purpose, it seems incumbent on the person advancing it to see it applied to that *specific* purpose, as the land will be liable to *no more* than what is *actually* employed *according to the act*.

The case of *Sir John Cotterell et al. v. Serjeant Hampson et al.* is a strong instance of this kind (*t*). There a tenement called D. and a printing-house, were settled in 1658 on A. the father of the defendant, for life, then on his mother for life, and afterwards on himself in tail; and the printing-house being afterwards burnt, and A. being but tenant for life, he could not raise money to rebuild it. Whereupon, 22 Car. 2. (*u*) an act of parliament passed reciting the marriage settlement, and A.'s incapacity to rebuild, which enabled A. to sell his lands in K—— and S——, to rebuild and stock the printing-house for the benefit of A.'s wife and children; and the tenement called D. and land in K—— were vested in trustees, B. and C., to sell, to raise money for building and stocking the printing-house, and the surplus to purchase lands, to be settled to the uses of the said marriage settlement. A. and the trustees B. and C. in 1677, mortgaged D. to L. in fee. In 1680, A. made his will, and G. his executor, in trust for his son during his minority, who having married, he and his mother and G. transferred the executorship to P. (his wife's father) in 1682. And B. and C. (the trustees under the act of parliament) by appointment of G. transferred the equity of redemption of the mortgage to P. and another. And they and L. (the first mort-

(*ss*) [With costs.—Ed.]

(*t*) 1686, *Cotterell v. Hampson*, 2 Vern. 5.

(*u*) 1671.

gagee) in consideration of 1800*l.* paid by the plaintiff T. assigned the mortgage to him. In 1682; W. lent P. 260*l.* which the latter agreed should be secured by the said mortgage; and T. by writing under hand and seal, by P.'s direction, acknowledged himself a trustee for W. in the mortgage, as to the securing the 260*l.* after his own 1800*l.* and interest were paid. And P. and his co-trustee assigned the equity of redemption to W. for that purpose. And the bill was, that the defendants might redeem or be foreclosed. The defendant (A.'s son) insisted that he had been abused by the transfer of the executorship, and that no more money ought to be charged on the mortgage than what was taken up and employed according to the trust of the act of parliament. On the other side it was contended, that it could not reasonably be intended that the mortgagee could be privy to and could prove the laying out of the money according to the act of parliament; and that no man would lend money upon the trust of an act of parliament, if it was incumbent on him to see the money laid out and employed according to the act; and that such a construction of the act could not consist with the intention of the act, but utterly prevent the same. But it was decreed by the Lord Chancellor, that no more ought to be charged on the mortgage than what was taken up and employed according to the trust of the act of parliament.

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If money be advanced on sale or mortgage, under a decree of the Court of Chancery, and directions for that purpose, and be thereby directed to be applied for payment of debts, and a report be made ascertaining the debts, the purchaser or mortgagee advancing the money must see it applied in payment of the creditors. Payment by such purchaser or mortgagee to a trustee for the purposes in the decree or order mentioned, will not discharge them.

Decree to raise money for payment of debts ascertained by report, mortgagee under it, must see his money applied, or pay it into court.

Thus, in the case of *Lloyd v. Baldwin* (y), which appears to have been a bill filed by creditors against a mortgagee under a decree of the court, to make the estate in his hands liable to make good that decree, the reporter states, that a decree was

(y) 1 Ves. 173.

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made and directions for a sale or mortgage with approbation of the Master, and that the money raised thereby should be applied for payment of the debts (N), and a report was made ascertaining the very debts by schedule. Instead of applying the money as the decree directed, the estate was mortgaged to the defendant, and upon reciting the bill, and all the proceedings thereon, the money was paid to a trustee named by the defendant; on the part of the defendant it was insisted, that the estate was not liable in his hands to the demands of the plaintiffs, but that supposing it liable, it was only in default of payment by the trustee, against whom the plaintiffs should be first turned. *Sed per* Lord Hardwicke (Chan.) If the court should not hold this estate in the hands of the mortgagee to be liable, it would be vain hereafter to make such a decree for the payment of debts; for then any person might afterwards purchase with full notice, pay the money, and the creditors go without any satisfaction. It was true, it was an established doctrine, that on a trust or devise for payment of debts in general, without a specification of debts in a schedule, a purchaser would be indemnified, and not obliged to see to the application of the money, or look after the creditors, *which was in support of the trust, that the estate might be sold.* But if there was such a specification or schedule, a purchaser or mortgagee was bound to see to the application of the purchase money. So where there was a decree, which reduced it to as much certainty as such a specification; for the purchaser did not pay to the trustees in such cases, but must see to the application, and take assignments from the creditors: otherwise the purchaser ought to apply to the court that the money should be placed in the bank, and not taken out without notice

He may apply to have his money placed in the bank (O).

(N) The decree, as extracted from the Register's Book, was, "That the estate, or a sufficient part thereof, should be sold, &c.; and the money arising from such sale paid into court; and reserved further directions." See Belt's Supplement to Ves. sen. p. 102. This makes a material difference in the case. For the present practice, in cases of this kind, see the next note.

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Of payment of money into bank.

(O) This is now the common practice where the purchaser is bound to see his money applied and there is a suit depending, as then he will not be bound to see his money applied any farther than a payment into the bank in the name of the accountant-general of the Court of Chancery. The court will take upon itself the application of the money, which will exonerate the pur-

to him, the reason of which was, that it was at his peril. As to the order in which he was liable, they could not, by what they had done among themselves, change the security of the creditors, for that was reversing things. He was the defendant's own trustee, and possibly, after satisfaction against the estate, the mortgagee might come against the trustee, from whom he took covenants.

A notion has prevailed and been adopted by an able and ingenious annotator on Coke on Littleton (z), that it is a settled rule in the law of England, in which all the books agree, and for which the cases of *Elliott v. Merryman*, *Spalding v. Shalmer*, *Culpepper v. Aston*, *Cotterell v. Hampson*, *Smith v. Guyon* (a), are supposed to furnish decisive authority, that "if a person
 " devises lands *to trustees* to sell for payment of his debts
 " and legacies (and the same principle, if it exists, applies
 " equally to the case of a conveyance on similar trusts) if the
 " debts are specified or scheduled, the purchaser or mortgagee
 " is bound to see to the application of the monies; and the
 " ground of this conclusion is," said to be, "that his *specify-*
 " *ing them* is an evidence of his intention that the purchaser
 " shall be obliged to see to the application, and that his *non-*

Devise to trustees to sell and pay scheduled
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debts, purchaser bound to see his money applied
 (P).

(z) Vide Mr. Butler's note on Co. (a) Supra, [215. 218. 219. 222. 226. Litt. 290 b. [n. 1. ss. xiv. 1, 2, 3.—Ed.] —Ed.]

chaser or mortgagee. This was recognized as the prevailing practice of the profession in a late case, by his Honour the present Vice-Chancellor, who said "the payment of the money into the bank, under the direction of the court, is for the security of all parties; it is safer there than in the hands of the trustees, and must be considered as a payment made to the trustees. The court will take care that it is properly applied." *Binks v. Lord Rokeby*, 2 Madd. Rep. 239.

(P) The author here enters into a discussion (which occupies this and the next eighteen pages), whether the doctrine, as above stated, is correct, and the result of his disquisition is (pages 237, 8, 9, post), that a purchaser or mortgagee will in no case be bound to see to the application of his money where trustees are appointed to execute the trust, that is, *where a hand is appointed to receive the money*. Such a rule, it is admitted on all hands, would be attended with much convenience to purchasers in general; but the prevailing opinion of the profession at the present day is against the learned author's conclusion; for which see Sugd. Vend. & Pur. p. 443, 5th edit. and infra, 258, note (T).

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*Mortgages
under trusts,
for payment of
legacies only,
must see his
money applied.*

*Conveniences
and inconve-
niences of rule.*

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“ specifying them is an evidence of the contrary. For,” it is said, “this distinction is not to be considered as taking its rise from any *fundamental principle of equity or justice*, that when the testator devises in one manner, the purchasers or mortgagees should be answerable; and that if he devises in another manner, they shall not be answerable *but merely as a rule of construction*; for it is clearly in the testator’s power to make the purchaser or mortgagee either answerable or not answerable. Where there is not any positive clause or expression to denote his intention one way or the other, recourse,” it is said, “must be had *to implication*, and when there is no contrary implication, the courts consider *the modes of the devise* in this respect to amount to an implication. As to legacies, they, from their nature, must be considered so far as specified or scheduled debts, that the purchaser or mortgagee from a devisee of a real estate in trust to sell it for the payment of debts and legacies, must see his money applied in discharge of them, unless there is an express clause, or sufficient implication from other parts of the will, that the testator intended to free him from that obligation.” The inconveniences of this doctrine are justly lamented by the author of the note to which I have alluded, who feels in common with other practitioners, “that though in some cases it may be of great service to the *cestui que trust*, as it preserves his property from the speculation and other disasters to which, if it were left solely to the direction of the trustee, it would necessarily be subject, yet it is frequently productive of more inconvenience than real good; for” (as is truly observed) “if the *cestui que trust* is a married woman, an infant, or otherwise incapable of giving their assent to the payment to a trustee (and such are the general instances in which this difficulty occurs), the person paying it cannot be indemnified, but by paying it under the sanction of a Court of Equity, this retards, and often absolutely impedes the progress of the business, involves the parties in an expensive and intricate litigation, and puts them to a very great and otherwise useless expence.”

*Reasons for re-
jecting rule,
“that if one*

But we have seen that the circumstance before suggested, that trusts of this kind cannot be executed without a suit in

Chancery, which would be extremely inconvenient, and not the form in which the object of the trust is stated, was the true reason which gave rise to the rule, that where debts are charged generally, the purchaser shall be discharged from seeing to the application of the money provided for that purpose (b); and in the same case in which this cause of the rule is mentioned, a reason is suggested for the rule on which lands, in the case of *subsisting charges, as annuities*, to which the distinction is supposed to be confined, shall be charged in the hands of a purchaser; namely, *because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund*; now unless a rule has been established in cases of debts, scheduled or legacies, different from that which exists in cases of debts charged generally, the inconvenience attending such rule seems a sufficient reason for rejecting it at this time of day, when the advantages arising from the free alienation of property are found to outweigh every other consideration consistent with a reasonable attention to the safety of the persons interested; and it is with a view to the fair discussion of this point, that I have been induced to state the cases upon this subject distinctly; and if I should be so fortunate as to remove the difficulty, I trust that will be accepted as a sufficient excuse for the length at which this subject is investigated. With a view to this object I shall first observe, that in *no one* of the cases to which allusion is generally made as *having settled the principle*, against which I mean to contend, did *that point* come before the court. The cases of *Elliott v. Merryman*, and *Smith v. Guyon*, were those of a simple charge for the payment of debts. The only question in the case of *Spalding v. Shalmer* arose between the heir and the purchaser, and the decision was merely that where lands are devised to be sold to pay the debts in a schedule, the purchaser shall not be prejudiced, though more be sold than is required. The same point and between the same parties was discussed, and decided in the case of *Culpepper v. Aston*. The case of *Cotterell v. Hampson*, turned upon the construction of an act of parliament, in which the legislature infringed upon a settled property, in which case the power could not be ex-

devise lands to trustees for payment of debts in a schedule or legacies alone, purchaser or mortgagee shall see his money applied."

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Observations in derogation of rule respecting scheduled debts.

(b) Vide *Elliott v. Merryman*, supra, 218.

tended in construction beyond the precise words of the legislature. *None* of these cases *therefore* called for, or involved the establishment of the rule, "that if a person devises lands to trustees to be sold by them for the payment of his debts, and specifies or schedules them, or of legacies, the purchaser shall be bound to see to the application of his money." And the only instances among these cases in which the courts were called upon to decide between creditors and purchasers, are cases of mere charges (*c*), in which *no trustees* were expressly appointed. And in the first of those cases, and in which this supposed rule seems to be first started, the rule is stated "as to a naked trust," (*d*) directing land to be sold, "which is *clearly distinguishable*" from a devise to trustees to sell. "And the Master of the Rolls after stating it, seems to deny the applicability of the second rule; for, explaining a possible distinction to be taken between lands appointed to be sold for, and lands only charged with, the payment of debts, he says, that, in the former case, the trusts might be said to be performed as soon as the lands were sold, but that the trust was not performed in the latter case till those debts were discharged; and his Honour admits the latter rule as applicable where lands are charged with annuities," because it is the very purpose of making the lands a fund for that payment, that it shall be a constant and subsisting fund, "*but where lands are not burdened with such a subsisting charge, the purchaser, he says, ought not to be bound to look to the application of the money.*" AND THAT, HIS HONOUR SAID, SEEMED TO BE THE TRUE DISTINCTION."

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But the cases of *Culpepper v. Aston*, and the *Anonymous case* from Salkeld (*e*), decided in the House of Lords, are not merely open to the observation, that they do not support the rule of which we are now speaking, but they appear to me to militate against it; for the second resolution in the case of *Culpepper v. Aston*, considers the case of a devise for payment of debts *generally*, as being merely a *stronger case* than a case where debts *are scheduled*; for it says, "*especially*" where no

(*c*) Vide supra, 218. *Elliott v. Merryman*; *Smith v. Guyon*, 222. *Lloyd v. Baldwin*, 227.

(*d*) Vide supra, 218. *Elliott v. Merryman*.

(*e*) Supra, 216, 17. 219.

schedule of debts is made for the purchaser to ground his inquiry on; which, according to the common acceptation of language, imports that the resolution was in an uncommon degree applicable to the case of a general charge, and admits that it would have been applicable even in the case of a schedule. And the *Anonymous case* in the House of Lords is a legislative recognition of the principle, "that the estate is debtor for the debts and legacies, but not for the default of the trustees, and therefore is only liable so long as the debts, &c. shall or *may be paid.*"

From what has been observed, it will appear that the authorities on which this rule is supposed to be founded, are so loose and indirect in their application, that it is impossible, in several instances, to say to which kind of trust they apply, and that in no instance has it been decided *as to a devise to trustees expressly in trust to sell*. And if so, however respectable may be the names of the judges who have thrown out their ideas that such a rule existed, any express decision against the application of the rule, in respect of *a particular kind of trust*, appears to be sufficient to exclude that class of trusts from the generality of its application. And the following cases appear to me fully in point.

The first occurred in the year 1674 (*f*). A., the plaintiff's mother, being possessed of 160*l.* as guardian to the plaintiff, and which was his proper money, lent it to the father of B., one of the defendants, who gave a bond for the repayment thereof with interest, and afterwards by his will he appointed his *executor* to pay it, amongst other debts, within a year after his death, and this to be out of his personal estate, if that was sufficient, but if not, *then to sell his real estate*; and in default of payment, then the said testator B. devised both his real and personal estate to *certain trustees* in the will named, to the use of the said A. and to his daughters, to pay the said 160*l.* The estate was conveyed and transferred from one to another, till at last it was sold to the defendant E. against whom a bill was brought to recover this debt. On the part of

Devise to pay debts out of personal estate, that insufficient real estate to be sold,—personalty to be first applied, then money raised by sale of estate.

(*f*) *Prescott v. Edwards et al.* Finche's Rep. Eq. 137.

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E. it was insisted that he had no notice of the plaintiff's demand, and therefore that the plaintiff ought not to be satisfied out of the *real estate*, but out of the personal estate, which came to the hands of the executor of B. the testator, who had ~~sufficient~~ assets to satisfy the same; and that E. had paid a full ~~consideration for~~ the purchase of the real estate; and that if the personal estate ~~should~~ not be sufficient, ~~then~~ the purchase money which was paid to the testator's sons, and some other lands which came to one of them, by the death of his father, ought to be applied to satisfy the said debt in case of the lands purchased by the defendants. This was decreed accordingly (q).

Devise in trust to sell and pay mortgages, and then legacies, purchaser must see his money applied (R).

The next case occurred in the year 1682 (g), which was about the period at which the case of *Culpepper v. Aston* was under discussion. A. having mortgaged his lands, devised them to B. in trust, in the first place, to pay off and discharge the mortgage on the same; and in the next place, for payment of several legacies, and particularly a legacy of 2000*l.* to C., the remainder in fee to A., and made A. his executor. A. proved the will, and paid several debts owing by the testator that were not mortgage debts; and, to raise money for that purpose, made several new mortgages of the lands in question. It was

(g) *Brent v. Best*, 1 Vern. 69.

(Q) Little or nothing can be inferred from this case applicable to the rule in question, except perhaps that the purchaser ought to have seen his money applied; for the arguments on which the decree is founded seem to admit, that if the purchase money had been misapplied, the estate would have been liable.

As to devise to pay off mortgages.

(R) If the testator (as the case states) had mortgaged his lands, and then devised them to trustees, in trust to sell and pay off the mortgages on the same, the purchaser could not do otherwise than see his money applied in payment of the charges; for he could not procure a good title without the concurrence of the mortgagees, they having the legal estate and title deeds. But if one estate be devised to trustees to sell and pay off the mortgage on another estate, this would throw the onus on the purchaser to see his money applied for that purpose; yet, it is apprehended, a mere declaration, in a case of this kind, to pay mortgage debts generally, without any further specification of the names of creditors, sums due, &c. would not place the mortgages on the footing of scheduled debts, and render the purchaser liable to see to the application of his money.

insisted, on a bill in Chancery filed to recover C.'s legacy, that after the mortgages made by the testator were discharged, the land then should stand charged with that legacy, and that then C. ought to be let into an immediate satisfaction thereof, and ought not to be postponed by the new mortgages made by B. But it was insisted by the counsel for the mortgagor, that C. could not be admitted to redeem part, without redeeming the whole, and that the lands stood charged as well with the mortgages made by B. as with those made by the testator. And in this case B. was not only a trustee for the payment of debts, but also executor to the devisee, and so the lands in his hands became *legal assets* (h), and charged with all the debts of the testator, and by consequence with the new mortgages made by B. the money having been raised and applied for payment of the debts of the testator. But it was replied, that it was so where a general trust is raised for the payment of debts; but in this case B. was a *special* trustee, directed by the will to pay off the mortgages and then the legacies, and that no provision was made for other debts. *Sed non allocatur.* [234]

The cases last mentioned appear to me to have involved a decision of the question in discussion; but it came purely and directly before the court in that which follows.

A. made his will (i), and thereby directed that all his personal estate (except as therein excepted) should be applied, as far as the same would extend, in payment of debts, legacies, and funeral expences, and of all annuities by him granted; and if such personal estate should not be sufficient for those purposes, then it was his further will and desire, and he did direct, that the deficiency, whatever it might be, should be paid and made good out of his real estate (except a part therein mentioned, which he did not intend to make subject thereto); and which real estates he charged with the payment of

Devise to A. for life, remainder to trustees to sell, and divide money between children, two are infants, one abroad, trustees sell, and purchaser refuses to complete his purchase, there being no exonerating proviso in will. Contract decreed to be per-

(h) *Quere*—for in no case would the assets be legal, except where the executor has a naked power to sell *qua* executor. Per Lord Camden, in the case of *Silk v. Prime*, 1 Bro. Ch. Ca.

138. [Et vide post, 318.—Ed.]

(i) *Cuthbert et al. v. Baker*, 4th July, 1790, Reg. Lib. 4. 441. [The correct reference is Lib. Reg. A. 1790, fo. 442.—Ed.]

formed, and purchaser to pay infant's shares into court, and residue to trustees.

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such deficiency, to whose hands soever the same came. And, so subject and exempt, he gave, devised, &c. all his real and personal estate in the following manner: certain parts of his estate to his wife in fee, and as to the manors, messuages, &c. not given to his wife in fee, he devised them to his wife for life, and, after her decease, he gave the same to trustees in trust to sell, and to divide and distribute the money which should arise by such sale, between and amongst *such* (s) [child and children of A. B. on the body of his then wife begotten, and *such* children of C. D. as should be living when the devise to the trustees should take effect,] equally share and share alike, to take *per capita* and not *per stirpes*; if but one such child, the estate to be transferred to him, and not to be sold. The wife died. One trustee died in her life-time. The surviving trustee sold the estate by auction. The personal estate was sufficient to discharge the debts. The claimants, under the devise to children, were seven children of A. B., and six children of C. D., who were entitled to the purchase money in equal shares. One of the children of C. D. was *in the East Indies*, and two were infants. The purchaser refused to complete his purchase; objecting thereto on the ground that *there being no proviso in the will to exonerate the purchaser from seeing to the application of the money*, the purchaser was bound to know or find out what children of the persons, in that behalf named, were living at the testator's wife's death, for that *such children* ought *individually* to execute the conveyance, and *give releases* for their respective claims; and that *one being in the East Indies*, and two being infants, could not join in such conveyance. But the decree was, that the contract should be carried into execution, that the infants' shares of the purchase money should be paid to the accountant-general; and that *the remainder* of the purchase money *should be paid to the trustee*. The decree proceeded to direct, that all proper parties should join in the conveyances.

(S) "Of the children of A. B., C. D., and E. F., as should be living at the time when the devise to the trustees should take effect." This appears to be the correct state of the case, instead of the passage in the text between brackets.

This decision, though not final, as it still left room for an application to the court to determine who might be proper parties to the conveyance, appears to me to be *conclusive* on the question, whether the persons beneficially entitled are necessary parties? because there can be no ground to consider those persons as necessary parties, unless it be *to discharge* the purchaser; but there seems to me to be no power in the court to compel a person beneficially interested in money to arise by sale of land to discharge that land, *unless it be upon paying or securing the money to him*. But the court, by directing the payment to the trustee, has done that which renders a direction to pay to the *cestui que trust* impossible.

Deduction from last case.

And it was said, in the case of *Crewe v. Dicken* (k), that in a case at the Rolls, though it was not decided, Lord Kenyon, then Master of the Rolls, inclined strongly to the opinion, that trustees having the power to sell, must have the power incident to the character, viz. the power to give an effectual discharge.

Power to sell includes power to give discharge for purchase-money. Semb.

Indeed, the reason of the thing is so completely with the decisions and opinions I have last stated, that it seems rather matter of surprise, that, on a question which so often occurs, and which when it does occur, is generally attended with so much inconvenience, no accurate investigation of the authorities should have been made to ascertain the foundation of the supposed rule, which, on the first blush, militates so totally against the *very nature* and directions of the trust constituted. The creator of such a trust, having in himself an absolute ownership, gives his lands to certain persons in trust to sell, and to pay and apply the money, or certain parts of the money arising by such sale, in a given way. On what reasonable pretence shall the Court of Chancery take the administration of this trust out of the hands of the trustee? Is there any fundamental principle of law or justice, on which such proceeding can be supported? The note, to which allusion has been made, as one ground, resorts in defence of the rule to

Continuation of Author's reasons for rejecting rule in page 228, 9, ante.

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(k) *Infra*, 244. 4 Ves. 99.

the nature of trusts, and an observation (l) of Lord Mansfield's, in *Burgess v. Wheate*, is stated, "that the *cestui que trust* is actually and absolutely seised of the freehold, in the consideration of a Court of Equity; that the trust is the land in that court, and that the declaration of the trust is the disposition of the land." But Lord Mansfield was observing, upon a case in which the entire legal estate of the land was in one person, and the entire trust, or equitable estate, in another, and not on a case where the trustees had a *duty* to discharge, and *distinct trusts* to administer. The situation of such trustees is well described in the Chief Justice's argument in the case of *Roper v. Radcliffe*, 9 Mod. 185. His Lordship says, "Consider the *interest and power* of the trustees (m); *they, amongst them, have the whole trust of the lands, which is a power over the estate therein; and those who are entitled to have particular sums raised, have particular trusts carved out of the inheritance, in nature of chattel interests; for he that has 500*l.* appointed to be raised out of 100*l.* a year, has an interest (in the land) of like nature, and much of the same continuance, as if he had a trust (therein) for five years. If the trustees make not the most of the lands, or suffer not him to do it, they break their trust, a trust to sell being in the nature of a power to sell, and till sale the cestui que trust's right to the profits is the same as if no such power. By sale his interest in the land is gone, and he now has a trust in the money, and is paid so much the sooner."*

But admitting that the *cestuis que trust* have an interest in the lands co-extensive with *their* interest in the money to arise by sale, that interest extends equally to the rents and profits, as it does to the lands; but yet I never heard it doubted, but that trustees, to whom lands were conveyed or devised for sale, and to pay and apply the purchase money between certain persons, might discharge the tenants on payment of the rents, or the purchasers of the produce on payment of the price for which it is sold. *The trust gives a right to an*

Trust to sell in
nature of power
to sell.

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(l) Vide Mr. Butler's note, Co. Litt. 290 b. [s. xiv. 1 Bl. Rep. 123, S. C. and P. 1 Eden, 226.—Ed.]

(m) They were trustees for the sale of an estate for the payment of legacies.

account and benefit of rents and profits till sale, but none can give a discharge for them but the trustees. What essential difference is there between rent and purchase money on sale as to the present point? "A rent is the price for which the profits of the land are sold for one year, and a forehand rent is properly the taking up the profits of land by anticipation; and on a sale, all the profits of all future years are sold, and the party receives the price, which is receiving the profits by anticipation; and no distinction is between forehand rent and after rent; they are both the profits of the land. Profits taken yearly come in all of a lump on sale; and the right to the one or the other, is a right to the profits out of the land." If a trust were created, and the trustees confined to pay and apply money to be taken out of the annual rents and profits, no man could doubt but that the trustees could give receipts for the rents and profits; upon what principle shall the taking the rents and profits by anticipation alter the capacity of the trustees? The same *annotator* farther considers the rule as a rule of construction, affirming, that the specification of debts is evidence, from which an intention is to be implied, that the purchaser shall see to the application of the money. But surely such a conclusion is not warrantable upon any acknowledged principle of construction; clear expression may controul implication, but implication cannot controul clear expression. The author of the trust directs the trustees to sell, and to pay and apply the purchase money to specific purposes, which necessarily involves the capacity of receiving. It seems a solecism to say, that ascertaining the precise objects to whom the trustee is expressly directed to pay money, shall furnish an implication that the trustee is not to receive that money to pay and apply it.

The conclusion, therefore, afforded, from the consideration of the cases generally cited in support of the rule, and from the cases of *Prescott v. Edwards*, *Best v. Brant*, and *Cuthbert v. Baker* (n), with the fair reasoning that presents itself on the subject, seems to be, that the general *dicta* to be found in the books, as to the necessity of a purchaser seeing to the appli-

Conclusion,
that purchaser
is to see his
money applied
in payment of
scheduled debts,
only where
there are no
trustees, for if
there are trus-

(n) *Supra*, 232: 235.

tees, they can give good discharges.

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cation of his money, where the debt or sum to be paid is specified or scheduled, are applicable only to cases where there are no trustees expressly named and authorised to sell and apply the purchase money; and that where a devise or conveyance is made to trustees in trust to sell or dispose, and to pay and apply the money raised in the discharge of debts in a schedule, or of legacies, or for any other specific purpose, the purchaser or mortgagee is not bound to see to the application of the money; or in other terms, that wherever the author of a trust has appointed a hand to receive the money, that hand is capable of giving an effectual discharge for the money received (T).

Consequence of Author's rule.

(T) The consequence of this doctrine would be, to confine the liability of the purchaser to see to the application of his purchase money to one individual case, namely, to the case where the trust is limited and defined in its nature; but where there is no trustee appointed to carry it into execution, the land descending to the heir or devisee clothed with the trust;—the case of an executor having a power to sell being the same as an express devise to a trustee; for the executor having a power to sell, will have (according to the rule in p. 235 a, ante) the concomitant power of giving an effectual discharge for the purchase money. So that in all cases where the trust is general and undefined, or where a trustee is appointed to superintend the purposes of the trust (however undefined or however explicit the nature of the trust may be), the purchaser would in every such case be exempt from the burthen of seeing his money applied. This is a consequence certainly not borne out by the cases; but it does not appear to be otherwise than reasonable if there be no fraud between the contracting parties.

His and Mr. Sugden's construction of *Cuthbert v. Baker*;

In the case of *Cuthbert v. Baker* (on which the learned author must be considered as founding the whole of his argument, for the other cases of *Prescott v. Edwards*, and *Brent v. Best*, seem barely in point) we are in possession of the facts and decree only, and not of the grounds on which that decree proceeded. It was conjectured by the author (and it can be but conjecture or inference on either side, in the absence of a full report of the judgment) that the rule which induced the decree was the rule for which he contended, viz. that a hand being appointed to receive the money, the purchaser was not bound to see to its application; and for this construction he relied principally on the ground that the decree being to pay the residue of the purchase money to the trustee, the purchaser could not be bound to see it applied farther; for if he were bound to see it paid to the *cestui que trust*, then the previous payment to the trustee rendered that liability impossible to be performed, which could not have been the meaning of the decree. And this reasoning the learned author thinks conclusive on the question. But Mr. Sugden observes, in his *Treatise on Vendors and Purchasers*, p. 446, 5th edit. that this ground wholly fails him; for that the decree was merely

But where money is raised by virtue of a power or trust, and confined to a sum sufficient to pay debts or the like, *in case of the deficiency of another fund*, it seems that the purchaser or mortgagee must see to the necessity of raising it; for the power or trust depends on the insufficiency of the other fund, and the

Inquiry must be made as to the necessity of raising money, if it be raiseable only on deficiency of another fund;

in conformity with the prayer of the bill, the *cestui que trusts* being plaintiffs and the prayer of the bill being, that the infants shares might be invested, and that the remainder of the purchase money might be paid to the trustee. And that gentleman conceives, that the decision of Lord Thurlow in *Cuthbert v. Baker* may be referred to a more solid principle, without impeaching the settled doctrine on this subject, or opposing the authority of former decisions. The trust, he remarks, was for such of the children of three persons as should be living when the estate should fall into possession; and it was strongly insisted by the bill, and as Mr. Sugden apprehends with great reason, that the *cestui que trusts* were in regard to the purchaser undefined; and that he (the purchaser) was not bound to inquire how many there were, or who they were.

It is however observable, that the *cestui que trusts* cannot well be said to be unascertained when fourteen of them were parties to the bill, and the purchaser knew that the other three were under disabilities, and when previously to the commencement of the suit, the *cestui que trusts* who were of age and within the kingdom, offered to give the purchasers receipts for their respective shares; and it is admitted, that the receipt of the trustee would have been a sufficient discharge for the shares of the infants and also for the share of the *cestui que trust* who was abroad, it being considered difficult to maintain that the absence of a *cestui que trust* in a foreign country should in a case of this nature impede the sale of the estate. Hence, therefore, it should seem that the trust was neither undefined in point of the objects who were to take under it, nor was it substantially of that long duration which would exempt a purchaser from seeing his money applied on that ground. But it may be contended, that the deed must receive its construction from the moment of its execution, and that the liability of a purchaser to see to the application of his money will depend on the frame of the deed, and not on any subsequent event, as that the objects of the trust were actually ascertained before the sale or otherwise. Looking at the deed in the case of *Cuthbert v. Baker* in this light, we see that the money arising from the sale of the estate was to be divided between such of the children of three persons as should be *living at the time when the devise to the trustees should take effect*, thus fixing a particular period for the happening of the contingency; and *that*, a time which must of necessity happen before the sale could take place. It was therefore very different to a trust which directs a sale to be made, and the money arising from that sale to be divided between such of the children of three persons as shall be living at the deaths of their respective parents. This indeed would be a trust undefined in its objects, and protracted in its execution. But in the case in question, it could have been neither a difficult nor a tedious task for a purchaser

examined, and preference given to Author;

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necessity of a sale or mortgage to supply that, is confined to

to have inquired of three individuals, how many children they had living on a particular day? It should therefore appear, that of the two conjectures respecting the grounds on which the decree in *Cuthbert v. Baker* proceeded, the inference of the learned author is the most reasonable, especially as it was drawn in derogation of a rule acknowledged on all hands, to be productive of more inconvenience than real good.

who was not
wanting in au-
thority for his
opinion.

Since the learned author wrote, two cases on the subject under consideration have been reported; and though they have not expressly decided the point in his favor, yet they seem very strongly to sanction his opinion. And it is well known that Lord Redesdale, who was counsel for the defendant in the case of *Cuthbert v. Baker*, and who consequently must have known the true ground of decision in that case, considered it an authority for the position advanced in the text. Add to this the observations of Lord Kenyon in *Crewe v. Dicken*, and we shall see that our author was not singular in his construction of the case in question.

Payment to
trustees enough.

In *Currer v. Walkley*, 2 Dick. 649. Reg. Lib. A. 1784, fo. 625, where the trust was for payment of debts generally, the Lord Chancellor (Thurlow) is reported to have said, "If an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate [and dies before the conveyance executed], it is enough for the purchaser to pay the purchase money into the hands of the trustees to apply it, as it doth not lie with him to see it applied." And in a late case it is laid down, that where trustees are authorized to give receipts for the purchase money of land directed to be sold, and such purchase money is directed to be laid out in the purchase of other lands to be settled to the same uses as the lands sold, a purchaser having paid the money *bonâ fide* to the trustees and taking their receipt, cannot afterwards be affected with any misapplication of the money by them. *Roper v. Halifax*, 8 Taunt. 845.

Exonerating
clause may be
implied.

In *Balfour v. Welland*, 16 Ves. 151, certain estates were conveyed to trustees, in trust to sell and apply the money in discharge of debts mentioned in a schedule *pari passu*. The deed contained a provision limiting the time for creditors to execute the deed to eighteen months: creditors who should not execute within that period to be totally excluded, unless disabled by minority, in which case the same periods were to be allowed respectively after the disability ceased. It was farther provided, that it should be competent to creditors, mentioned in the schedule, to establish larger demands than were expressed, and to other creditors, not mentioned in the schedule, to establish their demands within the limited periods, and to have the same benefit as if they had originally executed the deed; with other powers and provisoes as to arranging claims, compounding debts, &c. but without any exonerating clause to purchasers, or declaration that the receipts of the trustees should be good discharges. After the eighteen months were expired, the trustees sold the estates to the defendant, who objected to the title on the ground, that he was bound to see to the application of his money. But Sir William Grant, Master of the Rolls, over-ruled the objection, observing there was no doubt that the trustees could give the defendant a complete legal title. The objec-

the limits or extent of such insufficiency; and there seems to

tion was, that if they misemployed the price, the purchaser might be called on to pay the money over again; in other words, that the purchaser was bound to see to the application of his purchase money.

His Honour thought *the doctrine on that point had been carried farther than any sound equitable principle would warrant. Where the act was a breach of duty in the trustee, it was very fit that those who dealt with him should be affected by an act tending to defeat the trust of which they had notice. But where the sale was made by the trustee in performance of his duty, it seemed extraordinary that he should not be able to do what one would think incidental to the right exercise of his power, namely, to give a valid discharge for the purchase money.* It was not however (his Honour continued) necessary to determine the point then; for the deed in question very clearly conferred an immediate power of sale for a purpose that could not immediately be defined, viz. to pay debts, which could not be ascertained until a future and distinct period. It was impossible to contend that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed, and yet it could not be ascertained till the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might have taken place at a time when the distribution could not possibly have been made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It was not material that the objects of the trust might have been actually ascertained before the sale. The deed ought to receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money, and their liability could not depend on any subsequent event. And there was another ground (Sir William thought) on which the purchaser might necessarily be safe in paying the price to the trustees. No creditors had any interest in the trust except those who should have executed the deed. It was evident from the whole tenor of the deed, that they contemplated and intended that all the money to be produced by the sale of every part of the property should come into the hands of the trustees, and should be managed by them until distribution—should be placed out in their names—and should by them be ultimately distributed. Then the trustees were as much appointed by the creditors to receive the money as by the debtor to sell the estate. How could those creditors ever complain that the money was paid to the very persons appointed by them to receive it? It seemed very clear that the trustees were fully authorised to give a valid receipt for the purchase money, and consequently the title was unexceptionable.

Latest general rule.

Deed to be construed from moment of its execution, not from subsequent events.

The judgment in this case is evidently in favor of the author's argument; and it is well known what respect ought to be paid even to the gratuitous opinion of the great Judge whose adjudication is here recorded. The probability is, that when the point shall call for an express decision, the court will decree, that where there is a hand appointed to receive the money, the purchaser shall not be bound to see to its application farther than a payment to the trus-

Concluding observations on the Author's rule in the text.

tee, unless he be aware that the trustee means to misapply the money, or know that he is so involved in circumstances that it would be dangerous to place it under his controul. It cannot, however, be concealed that the cases uniformly appear to have gone on the distinction between a *limited* and a *general* trust, and that Lord Eldon, in condemning the doctrine advanced in *Omerod v. Hardman*, 6 Ves. 654, n. (a), did not say it was wrong, because there was a hand appointed to receive the money (which was the fact), but because the first trust was for payment of debts generally; and this distinction it must be admitted is the present established doctrine of the courts, and ought consequently to be adhered to till expressly set aside, or another rule be substituted in its place. Till then *Cuthbert v. Baker* must be considered as a case *sui generis*, and the particular rules collected in the next note (where, it is conceived, a correct view of the law on this subject, in all its bearings, is exhibited) should, it is submitted, be adopted.

*Of clause to
alter and vary
securities.*

It is apprehended that the common clause enabling the trustees to alter and vary the securities on which a money-fund is invested, will of itself be sufficient to exonerate a mortgagor, in paying back his money to the trustees, from the burthen of seeing it applied even in the investment of another ample security, much more from the obligation of looking to the administration of the tedious, and perhaps complicated, trusts on which the money may have been settled. In a case which occurred in practice, A. bequeathed 10,000*l.* to B. and C., in trust, to pay the dividends to a married woman, and after her decease, in trust for such person as she should appoint; with power for the trustees to lay out the money on government or real securities, and to alter, vary, and transpose such securities as occasion might require; to which was added an indemnity to the trustees, their executors, administrators, and assigns, but no indemnity to persons paying them money,—a clause which should seldom be omitted in the preparation of any trust. The trustees laid out the money on mortgage. The feme covert by will bequeathed the money to other trustees upon long and multifarious trusts, dividing the money into several small portions, and bequeathing each portion to the children of persons unmarried, with benefit of survivorship, clauses of maintenance and advancement, and other special provisions, with an indemnity to her own trustees personally, but no indemnity to persons paying them money.

The estate on which the money was secured was contracted to be sold, and it was agreed that the money should be paid back to the trustees by the purchaser out of the purchase-money, when a question arose, whether he was liable to see to the application of the money so about to be discharged.

It was advised that the purchaser would not be involved in the responsibility of seeing to the application of his money to the numerous, undefined, and protracted purposes mentioned in the feme covert's will. It was observed, that in both wills there were ample indemnities to the trustees and their assigns, and that the trustees under the first will were empowered to lay out the money on real securities, and "to change and alter such securities as occasion might require, &c." This of itself implied a power to give an effectual receipt and discharge for the money, otherwise how could the trustees effectually change and alter the securities as occasion might require?—without that implied power the trust would be nugatory. If the trustees could not give a receipt now, neither could they have given an effectual receipt to the executors of the

be no mode of ascertaining the amount of the debts, and of the other fund, and the insufficiency of the latter to answer them with sufficient accuracy, without the interposition of a Court of Chancery, and a decree for a sale or mortgage to supply such deficiency; and though there be in such cases (o) a clause in the instrument, creating the trust for sale, &c. which makes the receipt of the trustee and indemnification to the purchaser, it will not avail the purchaser in cases of this kind, for that only operates in case of the trustees finding it *necessary* to sell; that is, of the prior fund proving *deficient* to answer the debts, &c. to the amount of the lands sold. In short, in such cases, the power of sale being confined to so much as shall be sufficient to make up the deficiency of another fund first appropriated, the persons entitled to the fund last appropriated,

*in which case
decree for sale
or mortgage
should be ob-
tained.*

(o) Vide *Culpepper v. Aston*, supra, *deaux v. Prideaux*, 1 Bro. Ch. Ca. 287, 215. Et *Dyke v. Ricks*, Cro. Car. et ante, 215, n. (B).—Ed.]
335. S. C. Sir Wm. Jones, 327. [Pri-

first will, their power to do which, however, was undoubted. The objection was, that if the trustees to whom the money was paid should misapply the same, the purchaser might be called on to pay the money over again. If the purchaser, in making such payment, were privy to an intended *devastavit*, then the objection might be of some avail, but when the money was received by the trustees in performance of their duty, it seemed extraordinary that they should not be able to do what was necessarily incident to a right exercise of their power, namely, to give a release for the money repaid them. The wholesome rule laid down by Sir W. Grant was, that if the money was liable to be paid at a time when the *cestui que trust* could not possibly be ascertained it must have been intended by the testator, that the trustees should of themselves be able to give a valid discharge for the money; *for the money could not be paid to any other person*; *Balfour v. Welland*, 16 Ves. 151. In the case in review, it was evident both the testators contemplated a power in the trustees to give good discharges, for they expressly provided that the trustees should be responsible for those receipts only in which they concurred; then if the trustees were to be responsible for those receipts in which they did concur, it was obvious that the mortgagor and those claiming under him were discharged from seeking any other hand for payment of the money to than that which was thus declared to be responsible for the receipt of it. The case of *Wood v. Harman*, 5 Madd. 368, was also referred to, where it was held, that an authority given by a testator to his trustees, to lay out and invest money on security, included in it, an authority to give sufficient discharges to the borrowers. On the whole therefore it was concluded that the proviso enabling the trustees to alter and vary the securities, was equivalent to the usual exonerating clause.

will have a right to call upon the purchaser to prove such deficiency and its quantum, which of course involves an account of its application; and admitting the deficiency to exist, and that if the purchaser can shew it, he will, by the clause respecting the receipt, be safe in regard of seeing his purchase-money on such sale, &c. applied according to the trust; and that is all the use of such clauses, as I conceive, in cases of the nature of those last-mentioned (U).

Of purchaser's liability to see his money applied.

(U) In forming an opinion of the liability of a purchaser or mortgagee to see his money applied when he is not expressly relieved from that burthen by the author of the trust, the following concise rules (exhibiting, by way of compendium, the affirmative and negative bearings of the doctrine in all its branches) will, it is hoped, (notwithstanding the lengthened details into which the present chapter has already run), find a sufficient apology for their addition to the text in the brevity of their compilation, and the consequent facility of their application to practice.

Preliminary remarks.

As a preliminary remark, it may be worth observing, that the ensuing rules are applicable only where there is not an express clause in the deed or will, exempting the purchaser or mortgagee from seeing his money applied, or where an equivalent to that clause cannot be collected from the terms of the instrument, construing the instrument by its application to the circumstances as they stand at the time of its execution, and not by any subsequent events. And it may also in this place not be amiss to notice, that in general, the objection started by a purchaser or mortgagee, that he is bound to see to the application of his money, is an objection to the conveyance, and not to the title; for, in most cases, the trustees have an indubitable right to sell, but the purchaser refuses to complete his purchase because the *cestui que trust* is not a party to the conveyance. See *Binks v. Rokeby*, 9 Madd. Rep. 227.

Cases where purchaser should see his money applied.

I. As to the cases in which a purchaser or mortgagee will be bound to see his money applied to the purposes of the trust:—

If an estate be conveyed or devised unto and to the use of A. in fee, in trust for B. in fee, or in trust for the children of B. in fee, and afterwards sold or mortgaged, the *cestui que trust* being the beneficial owner, the money must be paid to him, or applied to his use with his consent.

2. If an estate be conveyed or devised to trustees, in trust to sell or mortgage for the payment of debts scheduled or specified, the purchaser or mortgagee should see his money employed in payment of these debts. Ante, 215. 218. 220. 221. 239. *Dunch v. Kent*, 1 Vern. 260. *Anon. Mose.* 96. *Abbott v. Gibbs*, 1 Eq. Abr. 358. *Barnard.* 81. 2 Madd. Rep. 238.

3. If an estate be conveyed or devised in trust to pay legacies alone, the purchaser or mortgagee should see his money rightly employed. Ibid.

4. If the trust be for payment of debts generally, and also of legacies, and it is stated that the debts are paid, whereby the legacies become the only

Where a *special authority* is given to particular persons to give effectual receipts, those persons cannot transfer that au- Power to give receipts not transferrable.

charge, in this case also, the purchaser or mortgagee should see his money applied in payment of the legacies. 2 Pres. Abs. 222.

Cases where purchaser should see his money applied.

5. If an estate be conveyed or devised for payment of debts generally, and before sale the debts are ascertained by a Master's report, the purchaser or mortgagee will be bound to see to the application of his money. *Lloyd v. Garth*, Reg. Lib. 1748, B. fo. 85. S. C. 1 Ves. 173. Ante, 227.

6. If lands be vested in trustees by act of parliament in trust to be mortgaged or sold for a particular purpose, it will be incumbent on the mortgagee or purchaser to see his money applied accordingly. *Cotterell v. Hampson*, 2 Vern. 5.

7. If the trustee for sale or mortgage be called upon in the Court of Chancery for an account, and the trustee submit to the jurisdiction by answering the bill, the court will take the execution of the trust out of the hands of the trustee to be executed by itself; for it would be inconvenient to permit a sale but by the court where it has attached its jurisdiction. Consequently, if lands be devised to trustees to sell for the payment of debts generally, and the creditors file a bill to enforce a sale and payment of their debts, a sale or mortgage by the trustees after the bill filed would be void, *Walker v. Smallwood*, Amb. 676. S. P. 2 Madd. Rep. 227. Et vide ante, 228, unless, perhaps, the purchaser or mortgagor had seen to the payment of the debts.

8. If an estate be *charged* (which we have seen is the same in regard to the mortgagee's liability as an actual devise or conveyance) with the payment of legacies, and some of the legatees are adult, and others are infants, and the trustees have not any power to vary the securities, the estate may be sold or mortgaged for raising all the legacies at once; but the purchaser or mortgagee should see the legacies paid to the adult legatees, and the legacies of the infants invested in the funds or laid out on good security in trust for the infants. But this, it seems, will not deprive the infants on their coming of age from having recourse to the real estate to supply any deficiency of payment (in principal or interest) of the fund on which their legacies have been placed. *Dickenson v. Dickenson*, 3 Bro. Ch. Ca. 19.

9. If an estate be devised, subject to existing charges, it will be incumbent on the purchaser to see his money applied in discharge of those incumbrances. 1 Vern. 69. et vide ante, 233, n. (R).

10. A mere power to trustees to give receipts and acquittances, for the purchase or mortgage money, will not, as it should seem, be sufficient to exonerate a purchaser from seeing his money applied, if the trust be of such a nature as to require his observance of its due execution. But if the trustees have a power to compel the completion of all contracts, and to act as effectually, "to all intents and purposes," as the author of the trust could have done, this, it seems, will exempt a purchaser or mortgagee from seeing his money applied further than in payment to the trustees. See *Binks v. Rokeby*, 2 Madd. Rep. 289. S. C. on other points, 2 Swan. 222.

11. When a purchaser is bound to see his money applied, he must actually pay it to the creditors or legatees. And as the lien of each particular debt

One trustee renouncing, power remains to others.

thority even from the one to the others of them; but it seems, that by any of them *renouncing* such trust, it will remain in

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Cases where purchaser is exonerated from seeing his money applied.

extends to the whole property, each creditor or legatee should give as many receipts and releases as there are purchasers of the estate, supposing the estate to have been sold in lots. If the creditors are numerous, and there are several purchasers, it is sometimes recommended to assign the debts, &c. conditionally to a trustee, with a declaration, that his receipt shall be a good discharge, and then the trustee is made a party to each conveyance; but creditors will not easily divest themselves of their legal claims, not even on the faith of a trustee of their own appointment. If it should happen that a bill has been filed for the purpose of enforcing a specific performance of the contract, the purchaser will then be relieved from the burthen of seeing his money applied, by paying it into the bank in the name of the accountant-general. The court will take upon itself the right application of the money. Vide ante, 228, note (O).

II. With respect to the instances in which a purchaser or mortgagee will not be obliged to see his money applied :—

If the first trust be for payment of debts *generally*, he will be exonerated from the burthen of seeing to the execution of a trust so extensive and undefined, although he may have notice of some or even of all the debts. *Culpepper v. Aston*, 2 Ch. Ca. 115. 232. *Humble v. Bill*, 1 Eq. Abr. 359. *Dunch v. Kent*, 1 Vern. 260. *Turner Ex parte*, 9 Mod. 418. *Hardwicke v. Mynd*, 1 Anstr. 109. *Williamson v. Curtis*, 3 Bro. C. C. 96. *Ithell v. Bean*, 1 Ves. sen. 215. The land will be discharged as soon as the money is raised, although misapplied by the trustees; and the residue of the estates unsold will belong to the heir or devisee, the creditors or legatees having no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. *Anon. Dom. Proc.* 1 Salk. 153. In the case of *Lord Braybroke v. Inskip*, 8 Ves. 425, 426. 432. an objection was taken to a title, on the ground, that the above general rule did not hold where the purchase was not from the original trustees, but from others to whom they had conveyed. This objection the Lord Chancellor over-ruled from the circumstances of the case, without entering into the general merits of the question. The circumstances were, that the original trustees had long before conveyed to the trustees in the suit; *reciting in the deed that they had paid all the debts and legacies*. The banker's book also shewed that the legacy in question had been paid, and there was not any evidence produced to the contrary; and even without the banker's book the Chancellor said, the non-production of a release of the legacy, after the time which had elapsed, would not have been a valid objection to the title.

2. Where the trust is for payment of debts mentioned in a schedule, and also for other debts not scheduled, it should seem the purchaser will be bound to see his money applied in the payment of the *scheduled* debts. But if the scheduled debts are paid, then he will be exonerated; for, as to the residue of the trust, it is so unlimited and undefined that a purchaser could not reasonably be expected to see to its execution. The contrary of this position (that where the trust is for payment of scheduled debts, and also for debts unsche-

the continuing trustees or trustee, and may be exercised by them or him only.

duled, the purchaser will be exempt *ab initio*) may perhaps be inferred from the present Vice-Chancellor's observations in *Binks v. Rokeby*, 2 Madd. Rep. 239; but it is apprehended that the rule, as above stated, is borne out by the cases on this subject. The case of *Balfour v. Welland*, ante, 239, is very different from the case supposed.

Cases where purchaser is exonerated from seeing his money applied.

3. If the trust be for payment of debts generally, and also of legacies, the purchaser or mortgagee will be exempt; for the legacies cannot be paid until after the debts; and the debts not being specified, the purchaser or mortgagee will not be liable to see to the payment of them, and consequently not to the legacies, which, in fact, would involve him in an account of the debts. *Skillicorne v. Rogers*, Amb. 188.

4. If the debts are particularized, a purchaser or mortgagee will not be prejudiced by more of the estate being sold than is necessary. *Spalding v. Shalmer*, ante, 216, 17, 18.

5. If an estate be devised in trust to raise so much money as the personal estate shall prove deficient in paying the debts and legacies, a purchaser or mortgagee will not be bound to ascertain the deficiency. See ante, 222, 3, and n. (B) 215, and the distinction there.

6. Note, Trustees to sell for the payment of debts generally, may raise the same by a *bonâ fide* sale or mortgage without waiting for a decree, no suit being instituted; for that would be to drive creditors into Courts of Equity: and decrees do not give rights, but only enforce the due observance of powers and trusts. *Bath v. Bradford*, 1 Ves. 590.

7. If the time appointed for the sale or mortgage of the estate be arrived, and the persons entitled to the money are infants, or unborn, or incapable of joining in the conveyance, it should seem that a purchaser or mortgagee will not be bound to see his money applied further than by investing it in a fund of sufficient durability, in the names of the trustees, with a declaration from them that they stand possessed of the stocks and securities in trust for the infants, or contingent *cestui que trusts*.

8. If lands are devised to trustees in trust, by sale or mortgage, to raise money for various and extensive purposes (*Juxon v. Brian*, Pre. Ch. 143), or if the money arising by sale or mortgage, is to be applied on trusts which are of long duration (pl. 7.) or which require time and discretion, as in the purchase of estates, (3 Pres. Abs. 264.) or in the payment of scheduled creditors at a distant period (*Balfour v. Welland*, 16 Ves. 151, ante, 239, *in notis*), it is the prevailing opinion of the profession that a purchaser or mortgagee need not see his money applied further than by paying it to the trustee, who, in such case, is considered as having a plenary power over the money, and consequently the minor one of giving a good receipt and discharge for the same.

9. If the money arising from the sale or mortgage is to be invested in real or government securities, upon certain trusts, then it will be sufficient to see it so invested, procuring from the trustees a declaration that they stand possessed

Conveyance to three trustees and survivor, one dies, another releases, remaining trustee cannot make good conveyance; *secus*, if trustee releasing had renounced.

Thus, where estates were conveyed by a settlement made on the marriage of S. C. to A., B., and C. (*p*), their heirs and assigns for ever, in trust, that they and the *survivor* of them, and the heirs and assigns of such survivor, should, after the death of E. sell the estates for the best price that at the time of the sale could, in the judgment of the said trustees, be

(*p*) *Crewe v. Dicken*, 4 Ves. 97.

Cases where purchaser is exonerated from seeing his money applied.

of the same in trust for the purposes of the will. 2 Cas. & Opin. 114. 2 Pres. Abs. 222.

10. If the estate be sold by the Deputy Remembrancer of the Court of Exchequer under an extent, there the purchaser or mortgagee will be not be obliged to see his money applied in discharge of the crown debt; for payment into the Court of Exchequer will, as it should seem from the statute 25 Geo. 3. c. 35, sufficiently exonerate the purchaser or mortgagee from all further liability.

11. If power be given to trustees to sell lands, and divide the profits amongst *cestuis que trust*, who are infants, this enables the trustees alone to give effectual receipts to the purchaser. *Sowarsby v. Lacy*, 4 Madd. 142. The Will in this case devised certain lands to the testator's children, "the same to be sold when the executors and trustees of that his will should see proper, and the money arising out of the said lands and tenements to be equally and severally divided among his above-named children." The Vice-Chancellor said it was plain that the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and *not capable of signing receipts*. His Honour therefore must infer that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose. *Ibid*. So in *Lavender v. Stanton*, 6 Madd. 46, it is laid down broadly, that where trustees for sale are to apply the produce for an infant, the power of giving receipts to purchasers is necessarily incident, since *otherwise the power of sale would be wholly nugatory*.

12. It is not settled by authority that the common proviso enabling the change of securities is equivalent to an exonerating clause, but powerful arguments suggest themselves for so considering it. See ante, 240 b, 241.

13. Where trustees are authorized to give receipts for the purchase money of land directed to be sold, and such purchase money is directed to be laid out in the purchase of other lands, to be settled in the same manner as the lands sold, a purchaser having paid the purchase money *bonâ fide* to the trustees and taking their receipt, cannot be affected by any misapplication of the money by them. *Roper v. Halifax*, 8 Taunt. 845.

14. Where a mortgagee, on the marriage of his son, assigned over the mortgage money to two trustees, upon trust for the son for life, then for the intended wife for life, and afterwards for the children of the marriage, with a general power of attorney to the trustees to receive and get in the money, and "to do, execute, and perform all acts, deeds, matters, and things, in and concerning the premises as fully and effectually to all intents and purposes as the

had, and apply the money arising by the sale thereof, upon the trusts therein mentioned, "Provided, and it was thereby declared and agreed, and S. C. (the creator of the trust) for herself, her heirs, executors, administrators, and assigns, did thereby declare, direct, limit, and appoint, that the receipt or receipts of the said A., B., and C. (x), and the survivor of

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author of the trust could have done if the settlement had not been made," it was considered clear, on the authority of the above cases, particularly of *Binks v. Rokeby*, 2 Madd. 239, and *Wetherell v. Collins*, 3 Madd. 255, that the trustees could sufficiently exonerate the mortgagor. But it was advised, that if the mortgagor should not feel inclined to rely on the authority of these cases, his only course was to file a bill for redemption, (to which the trustees and *cestui que trust* should be parties,) and pray to have the money paid into court, and thereupon to have a decree against the defendants for a reconveyance; but it was added, that the costs of such a suit would fall on the mortgagor, and

Cases where
purchaser is
exonerated from
seeing his mo-
ney applied.

15. It has been lately ruled, that an authority given by a testator to his trustee, to lay out and invest money on security, includes in it an authority to give sufficient discharges to the borrowers. *Wood v. Harman*, 4 Madd. 368.

16. Note also, that a trustee of real estate for sale, who has renounced his trust, and released and conveyed to his co-trustee, is not a necessary party in a conveyance to a purchaser, nor is it necessary he should join in a receipt for the purchase money. *Adams v. Taunton*, 5 Madd. 435, et infra, 250.

17. With respect to personal estate and chattels real, it is observable, that a purchaser will in no case be bound to see to the application of his money, where he purchases *bonâ fide* of an executor; for however leasehold estates or personal property may be bequeathed by the testator, they will devolve first on the executor, to be applied in a due course of administration, which will be equivalent to a bequest for payment of debts generally. Vide ante, 101 to 105. *Watts v. Kancy*, Toth. 141. 227. *Bonney v. Ridgard*, 1 Cox, 145. *Wale v. Booth*, 4 T. R. 625. 17 Ves. 165. But if leasehold estate or personal chattels be assigned to trustees, in trust to sell or mortgage, and apply the money arising therefrom on trusts which are limited and defined, the purchaser or mortgagee will be obliged to see his money applied in the same manner as if the trust had been concerning real estate; and it seems, that if a particular fund be pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted; vide *Coote on Mortg.* 185.

As to person-
ality.

18. In order to prevent the occurrence of questions of this nature, it should never be omitted to insert provisions in the trust deed; that the receipts of the trustees shall be sufficient discharges; and that the purchasers shall not be bound to see to the application of their money; and when necessary that the purchaser shall be exonerated from inquiring whether the sale or mortgage be necessary for the purposes of the trust, or whether any notice required by the terms of the trust shall have been given.

(X) If this clause, instead of pointing out the trustees by name, had provided, that "the receipts of the trustee or trustees for the time being, should

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them, and the heirs and assigns of such survivor, of the purchase-money to arise from such sale of the said estates, or any parts thereof, should be full and sufficient discharges for the same to the purchaser or purchasers thereof, his, her, or their heirs and assigns respectively; and that such purchaser or purchasers should not be further answerable or accountable for the application of such his, her, or their purchase-money, nor be any way obliged to see the same applied upon the trusts therein contained," &c. C. died, and A. being unwilling to act in the trusts after the death of C. by indentures of lease and release, conveyed and released all the said premises, and all his estate and interest therein to B. and his heirs. B. afterwards contracted for a sale of these estates; but the purchaser refused to take the conveyance, unless A. would join in the receipt of the purchase-money, which he declined. And on a bill filed by B. against the purchaser, to compel a specific performance of the agreement, the purchaser submitted, by his answer, that the receipt for the purchase-money, signed by C. alone, would not be a sufficient discharge for the same, and that A. ought to join in the receipt. On the part of B. it was said, the difficulty arose from A. having conveyed the estate to B. That it would be perfectly clear, only that the instrument he had executed, was not that sort of instrument that he ought to have executed; for he did not execute the deed of trust, nor did he ever act in it. That in *Sir Thomas Rumbold's case* he refused to accept upon the authority of *Bonifant v. Greenfield*, Cro. Eliz. 80, which cited stat. 21 Hen. 8. c. 4. That nothing vested in him, and that it was the same as if he were actually dead. That B.'s conveyance and receipt would be sufficient. A. had released all his interest to B.; and a release from one joint-tenant to another would release all the estate he ever had. Undoubtedly it all passed at law; and in the same manner the whole equitable estate was by the release vested in the other, to whom the release was made. On the part of the purchaser, it was contended, that this was different from the ordinary case, where

have been good discharges," the difficulty, it is apprehended, would have been obviated. See *infra*, page 247.

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the power to discharge the purchaser by the receipt of the trustees was given. The manner in which the trust was created, by this settlement, was, by making them first joint-tenants by express conveyance: But the mode in which they were to exercise the power of sale, and to give the receipt, was not by making a trust to them, their heirs and assigns; but the parties having reposed their confidence in the judgment of these three trustees, directed that they, the said A., B., and C. and the *survivor* of them, and the heirs and assigns of such survivor, should sell for the best price that could, in the judgment of the said trustees, be had (y): Then followed the directions as to the application of the purchase-money:—“And that the receipt or receipts of the said A., B., and C., and the *survivor* of them, and the heirs and assigns of such survivor, should be a sufficient discharge for the purchaser.” That a conveyance by them to three other trustees, would vest the estate in them; but it was very difficult upon the expression of this deed, that the judgment of these persons should be exercised, and the receipt of these persons should be a discharge to say that the judgment or receipt of the others was meant. Suppose B. had died, and the estate had descended upon his heir, A. still living; it was impossible to say the heir of A. was the heir, whose judgment was to be exercised, and whose receipt was to be given. Therefore, unless some bill was filed by those who were to have the purchase-money, or A. could be brought before the Court to join, it was not possible to say, the purchaser was not bound to see to the application of the money. The purchaser therefore could not be compelled to take the estate upon the receipt of

(Y) This clause was evidently prepared from a common form intended for a case where two persons should be trustees, and not three, and the names were filled in without due attention to the succeeding words. This inadvertence has, in many similar instances, occasioned much confusion, and with respect to wills it always engenders great difficulty.

Devise to two
and survivor.

The cases applicable to a devise to two trustees and the survivor of them, are *Vick v. Edwards*, 3 P. Wms. 372, commented on in Butl. Co. Lit. 191 a. n. (1). Fearne's Cont. Rem. 356. 359. 364. 366, 5th edit. 1 Pres. Con. 302. 2 Pres. Abs. 99. 3 Ibid. 352. *Harrison's case*, 3 Anstr. 836, cited post, chap. xii. *Weale v. Lower*, Pollexf. 54. 57. 2 Pres. Con. 136. Cov. Rec. 29.

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one trustee only. *Et per* Lord Loughborough, Chancellor: I do not feel how it is possible to help the plaintiff. If he had *renounced*, as in the case that has been put, he might dissent; where no estate passes, the whole estate would have been in the plaintiff, exactly as if the two other trustees had died in the life of the testator (settlor) he would have been the only person. But according to the way they have managed it, *he has accepted the trust, and conveyed away the estate*. That part of the trust, that consists in the application of the money, he could not convey away (z). The hazard probably is not great; but I do not know how to make the purchaser run the hazard. Taking the title with knowledge of the trust, he would be bound to see to the application of the money. I do not feel that I can make the purchaser pass over this objection (A).

Delegation of
powers by
donee.

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(Z) On the maxim *delegata potestas non potest delegari*, 2 Inst. 597. 2 Atk. 88. 2 Ves. 640; in other words, that a trustee, notwithstanding he has released the legal estate to his co-trustees, cannot delegate to another the personal trust and confidence reposed in him. But the above axiom does not apply to a general power, which though it may be within the terms, is not within the reason of the rule; and therefore a person who has a general power of appointment, may exercise that power in favor of another; by appointing to such uses as he shall appoint. And it is observable, that a distinction appears to be taken where a power is annexed to an interest, which is given to the trustee and his assigns. In this case it is said that the power will pass with the assignment of the interest, although there may have been twenty mesne assignments. And whether the claimant be an assignee in fact, or an assignee at law (as an heir or executor), it is said it will not make any difference. *How v. Whitfield*, 1 Vent. 338, 339. 1 Freem. 476. 2 Jones, 110. 2 Show. 57; and see on this subject Mr. Sugden's section on the transfer or delegation of powers by the act of the donee. Sug. Pow. 166, 3d edit. But it seems clear that all *discretionary* powers, such as consent to marriage, &c. will remain with the old trustees, notwithstanding they may have conveyed away the estate, even under a decree of a court of equity, to other trustees, and actually divested themselves of the legal estate, and all controul over the property.

Two points de-
cided by Crewe
v. Dicken.

(A) This case of *Crewe v. Dicken*, may be considered as having decided two points; the *first*, that if an estate be conveyed or devised to two trustees, and one of them declining to act, releases by deed all his estate and interest in the premises to the other of them, this will amount to an acceptance of the trust with all the personal and incommunicable powers annexed thereto; for the conveyance of all the estate and interest in the premises, necessarily presupposes, that previously to or at the time of such conveyance, the releasor had an estate and interest to convey, which he could no otherwise have than

by an acceptance of the trust contained in the original conveyance or devise; and the second, that if a trustee, who is unwilling to act (instead of releasing) renounce and disclaim the devise or conveyance, then he will be exonerated entirely from all the burthen of the trust, both in regard to the estate, and also the powers with which the author of the trust would have wished to depute him.

But as to this latter point, there seems to prevail a difference of opinion at the present day, with respect to deeds; and it is said, that as to the vesting of the estates many of the books, and especially Littleton, in his Tenures, s. 685, treat the acceptance of the conveyance or devise by one of several joint-tenants, as the acceptance of them all, and of a consequence as necessarily vesting the estate in them all; and therefore that the refusal by mere disagreement or declaration, with or without deed of one of them, would not vest a sole seisin in the other or others of them. To give such sole and exclusive seisin, it is contended there must be an *estoppel* by disclaimer on record, as distinguished from a deed *in pais*, (see 3 Co. 26 a. 2 Pres. Abs. 225. 3 Ib. 105.) And it is further said, that on the death of all the joint-tenants, except the one who disagreed, he would not be at liberty after he became the survivor, to prevent the estate vesting in him solely, by any other means than by a disclaimer on record. And as to the powers, &c. it is further urged, that although a trustee, who is a joint-tenant, may refuse to take an estate (by disclaiming on record), yet he cannot relinquish his particular share of authority in a joint power, which is a thing entire, and can only be extinguished by a joint abandonment of the whole power by all the trustees. Et vide pl. 3, infra. On this train of reasoning it is observable, that it does not apply where the trustees are tenants in common, as in that case each tenant will have a distinct share, which he may separately disown and disclaim; and where the trustees are joint-tenants (which is most commonly the case) it cannot have the full effect for which it is adduced, because it is wanting in legal authority.

Objections to the last point.

As to the survivorship of powers, these five points are deducible from the cases:—

1. That where a power is given by two or more by their proper names, who are not made executors, it will not survive without express words.

2. That where it is given to three or more generally, as to “my trustees,” “my sons,” &c. and not by their proper names, the authority will survive whilst the plural number remains.

3. That where the authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it. But

4. Where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive; and

5. That if a power of sale be reserved by settlement to three trustees by name, and *their heirs*, two surviving trustees cannot execute this power, although the money be directed to be paid to the trustees or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor. It would have been otherwise if the power had been given to the trustees by that description, without naming them. *Townsend v. Wilson*, 1 Barn. & Ald. 608. S. C. 2 Madd. 361. *Sharp v. Sharp*, 2 Barn. & Ald. 405.

Smith v. Leigh, 6 J. B. Moore, 214. *Cole v. Wade*, 16 Ves. 45. S. C. 19 Ves. 424. Sug. Pow. 165 a, 3d edit. In *Townsend v. Wilson*, ubi sup. it was well put by Preston arg^o. that the power to change trustees in the settlement in question, in case any of them should happen to die, afforded strong internal evidence that the parties contemplated the possibility of surviving trustees, and that they, as the trustees for the time being, would be the persons to execute the power. But the Court of King's Bench certified to the contrary on the ground, it is presumed, that a power given to several persons by name, cannot be executed by survivors. See also Dyer, 177, pl. 32. §10, pl. 24. *Peyton v. Bury*, 2 P. Wms. 626. Moore, 61. *Mansel v. Mansel*, Wilm. Rep. 36.

The necessity of providing for the survivorship of powers in reserving them to trustees, is still further enforced by the consideration, that infants cannot effectually convey under a power without the aid of an act of parliament; and the statute of 7 Anne, c. 19, has been held to extend only to plain and express trusts, and not to such as are implied or constructive. *Goodwyn v. Lister*, 3 P. Wms. 387; ib. ante, 205, n. The 10th section of the new or substituted act, 6 Geo. 4. c. 74, does not, it is apprehended, help this case. See ante, p. 207 b.

OF DISCLAIMER.

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*Disclaimer of
trustees ap-
pointed by deed.*

As the subject of disclaimer is closely allied to the head of law treated of in this chapter, and intimately connected with the consideration of the preceding case of *Crew v. Dicken*, it may not be deemed irrelevant (however wide of the object of this treatise) to subjoin a few observations on a branch of learning so practically useful to the conveyancer.

1st. It is observable, that if an estate be conveyed to three trustees, in trust to sell, with a clause that their receipts shall be good discharges for the purchase-money, and there is not any clause for the change and new appointment of trustees, or there is such a clause, but the same is inefficient, and one of the trustees refuses to accept the trust, the usual practice is to require the trustee so refusing to release all his estate and interest in the premises to the other trustees, or to execute a deed of disclaimer. Where he releases he is considered as having, in the first instance, accepted the trust (sed contra now, see p. 249, infra,) and therefore, as to that part of the trust which consists of personal confidence, he cannot transfer it to the other trustees. The proper course therefore, in such cases, will be for the trustee so declining to act, to execute a deed of disclaimer, carefully refraining from an acknowledgment of an interest by release or conveyance to his co-trustees, answer in Chancery, or other means. And as one man cannot impose a trust on another against his consent, it seems reasonable to conclude that a trustee, who has refused to accept the trust, and actually renounced by a deed of disclaimer, need not join in any receipt, and that in such case the receipts of the other trustees will afford sufficient discharges. See *Sir William Smith v. Wheeler*, 1 Vent. 128, (where the learned Judge Ventris observed, that a man cannot have an estate put into him in spite of his teeth). *Hawkins v. Kemp*, 3 East, 410. Litt. s. 685. Shep. Touch. 70; in which latter place it is said, that when the party hath once by his agreement made the deed good, he cannot afterwards by his disagreement make it void; and when once, by his disagreement and refusal he hath made the deed void, he cannot by agreement or

acceptance, make it good. Et vide *Leach v. Thompson*, 1 Vent. 198. 201. 3 Mod. 296. Bro. Abr. tit. Disclaimer, 54. tit. Joint-tenant, 570. Vin. Abr. tit. Disclaimer. Upon this, however, the doubt alluded to in the preceding part of this note, and also in pl. 3, infra, seems still to prevent the recognition of the point as clear law; and therefore in cases of this nature, the only safe and effectual course is, to file a bill in equity for an appointment of new trustees, and for a decree enjoining the old trustees or heir at law, as the case may be, to convey to the new ones. *Prima facie* the assent of every person to a gift or benefit will be presumed, but if he repudiate the benefit and declare that the grant as to him shall be a nullity, no court will force the estate on him against his inclination. This is the short principle of disclaimer, which need not therefore be of record, since that would give power to one man to put another to an unnecessary expence. Any written or even verbal renunciation of the gift, will be sufficient to throw the estate back again on the grantor. *Townson v. Tickell*, 3 Barn. & Ald. 31.

2d. The disclaimer of trustees under a will, who have never accepted the trust, has been provided for by the stat. 21 Hen. 8. c. 4, which enacts, that where part of the executors named in any will or testament, which devise lands or other hereditaments to be sold by such executors, do refuse to take upon him or them the administration and charge of the same testament, and the other executors do accept the care and charge thereof, that then all bargains and sales of all such lands or other hereditaments, by the executors who do accept only, shall be as good and effectual in the law as if the residue of the same executors so refusing had joined. Notwithstanding this act, it is recommended to devisees in trust to execute disclaimers, as affording direct and certain evidence of their refusal to act, and as obviating an objection which might otherwise be made to the conveyance of some of the devisees only, that the trustees or executors who do not join in the conveyance, may have previously sold the estate, in which case the first vendor would be preferred. The effect of the disclaimers will be to vest the legal estate and the rights and powers of sale, and of giving discharges for the purchase-money in the remaining trustees, or only acting trustee, if any, and if none, equity will supply the trust, either becoming itself the trustee and carrying the trusts of the will into execution, or on a bill filed for that purpose, appointing a new trustee and decreeing a conveyance from the old to the new trustees, or from the heir at law when necessary. This statute has been construed to extend as well to lands which are actually devised to two or more executors, as to lands over which there is merely an authority. Co. Litt. 113 a, n. 2. Ib. 236 a. n. 1. *Benifant v. Greenfield*, Cro. Eliz. 80. 269. 11 East, 288. 2 H. Bla. 620. Some gentlemen confine this statute to executors being trustees of the will, while others consider all trustees of a will for the sale of real estate, as executors within the scope of the act, which seems the more consistent interpretation. Lord Ellenborough, however, inclined (though rather evasively) to the former opinion in the case of *Dennis v. Judge*, 11 East, 288, where there was a conveyance by five trustees, but a defect of proof as to the execution of the deed by two of them. His Lordship observed, that the statute was passed to remedy the inconvenience where some of the executors refused to act; but in the case before the court there was no such refusal; so far from refusing to act, they had all apparently concurred in the conveyance, though there was a defect of proof

*Disclaimer of
trustees ap-
pointed by will.*

OF
DISCLAIMER.

as to the execution of two of them. Besides, the estate was not devised to them as *executors to be sold*, but as devisees, though they were also appointed executors. They had nothing to do with the land as executors. But if indeed, the fund, when raised, had been *distributable by them in that character, that might have brought the case within the rule contended for.*

Distinction as to the two latter cases.

3d. Here by way of parenthesis, note this distinction with regard to disclaimer between trustees who are appointed under deeds, and trustees who are appointed under wills. The renunciation of the trust by the latter is provided for by the statute, while the disclaimer of the trust by the former species of trustee depends greatly on the analogy which is supposed to exist between the cases. But a modern and judicious writer observes, that the analogy is not sufficiently strong and conclusive to render it clear that one of several joint-tenants under a deed, may disclaim merely because one of several joint-tenants under a will, for the purpose of executing the trusts of that will, is by the statute law allowed to discharge himself from the trusts by disclaimer, or, more correctly speaking, because the other executors or trustees are by the statute law empowered to act after one trustee has refused to take the office on himself. 3 Pres. Abs. 105.

Disclaimer not to be relied on, bill in equity preferred.

4th. From these observations, it should follow that the practice of one of several trustees appointed by deed, disclaiming the estate conveyed to him cannot be safely relied on. In a recent case which occurred in practice, leasehold estates were bequeathed to three persons on certain trusts, with powers of renewal, &c. to them and the survivors, and they were appointed executors. Two of the trustees proved the will, and power was reserved for the other to do so, but he would not act, and never obtained probate, nor received a legacy given him by the will. One of the acting trustees shortly afterwards died, and the questions were, whether a renewed lease might be granted to the remaining acting trustee without the concurrence of the non-acting trustee (who was living), or without his being required to join in the surrender, or whether, by the latter trustees now disclaiming by deed, his concurrence in the surrender would be rendered unnecessary. It was advised, that a difficulty existed in the case on account that it was not within the statute of Hen. 8. The acting executor had assented to the bequest, so that he and the non-acting trustee became joint-tenants, and it did not follow that the disagreement of the latter to accept the bequest vested the term in the former, and the non-acting trustee could not release to the acting trustee without becoming an efficient trustee himself. The only safe course, therefore, was to file a bill in equity, to have the non-acting trustee discharged from the trust, and a new trustee appointed in his stead, for there was not any power in the will for the appointment of a new trustee. Hence the necessity of an ample power in the will for the change and new appointment of trustees.

Since or during the progress of the last edition of this work, two cases have been decided on the subject of these observations, which require notice here.

Disclaimer need not be by matter of record nor by deed.

The first,—*Townson v. Tickell*, 2 Barn. & Ald. 31, where Holroyd, J. observed—"I think that an estate cannot be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it, until he does some act to shew his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shews

OF
DISCLAIMER.

that he never did assent to the devise, and, consequently, that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble and expence of executing a deed, to shew that he did not assent to the devise. Unless some strong authority were shewn to that effect, I cannot think that the law requires either of these forms. I am confirmed in that opinion by the case of *Bonifant v. Greenfield*, 1 Leon. 60. Cro. Eliz. 80. There the devise was to four executors: one of the executors refused to take out administration to the will, and it was objected that the same was not good: to which it was answered, that as it was devised to him for the intent to sell, if he refused to sell, he refused to take the estate, and so that it was unnecessary that he should join in the sale; the court, however, held the same good, although the devisee had not renounced the estate either by matter of record or by deed. It seems to me therefore, both upon the reason of the thing and the authority of this case, that the disclaimer need not be either by matter of record or by deed. In this case, however, the party has disclaimed by deed, which, in my opinion, is sufficient." All the judges having expressed similar opinions, it was decided that a devisee in fee may by deed, without matter of record, disclaim the estate devised. 3 Barn. & Ald. 39. Of course a stamp on such deed of disclaimer is unnecessary, it not being a release or renunciation of any interest or estate, but a disclaimer of all such interest. The instrument should not assume the shape of a deed, but of a memorandum.

In the *second* case, lands were devised to two trustees and their heirs, upon certain trusts; one wishing to decline, renounced probate of the will (they being also executors); and by indenture of release "bargained, sold, released, quitted claim, and conveyed" to his companion and his heirs, all and singular the lands and real estate, late of the said testator. On this instrument a question arose, whether the trustee, intending to disclaim, had not accepted the trust, by taking upon himself to convey. Lord Eldon thought the reasoning on which this objection was raised, was much too technical for a court of equity. If the essence of the act were disclaimer, a release, whereby a person declared that he would not take as trustee, gave the best evidence that he would not take as trustee. It was true that a release was the instrument of a person who thought he had something to part with; it was not a mere dissent or refusal to concur, but there was no case on the distinction between a disclaimer and a release, and his Lordship was of opinion that there ought to be no distinction. A decree was then taken by consent that the release operated as a disclaimer, and that the concurrence of the renouncing trustee was not necessary. *Nicloson v. Wordsworth*, 3 Swanst. 366. It is also observable, that in *Smith v. Wheeler*, 1 Vent. 128. S. C. 2 Keb. 773, a lease was assigned by deed to B. and C. of whom B. dissented, Lord Hale said C. was a good lessee, for the other trustee's disagreement made the estate wholly his. In the above case of *Nicloson v. Wordsworth*, the trustees were appointed by will, and though there is no ground for a different line of argument, where they are appointed by deed, yet Lord Eldon, in that case, particularly referred to the difficulty of applying his reasoning to the case where they were appointed by a conveyance to uses, saying that he thought Lord Hale's doctrine would not apply to such an instance, and that the party could not disclaim in the case of a conveyance to uses except by release with intent of disclaimer. If

Release no evidence of acceptance.

OF
DISCLAIMER.

*Disclaimer
where trustee
has a power
only.*

*Effect of dis-
claimer on
powers.*

[250]

*Trustee cannot
renounce after
acceptance.*

he were to say that a disclaimer would not be effectual he should shake innumerable titles. 2 Swanst. 372.

5th. If a trustee, having a power only to sell, and not an estate, renounce or disclaim, and there is not in the will a provision for the appointment of a new trustee, it seems that the will will be inoperative; for a Court of Equity cannot transfer such a mere naked authority from one person to another. In cases of this description, an act of parliament will be necessary to communicate the powers of sale, &c. to a new trustee. It is also observable, that any release or conveyance of such trustee must of necessity operate as a disclaimer, for it cannot as a conveyance, he having no estate or interest to transfer, and his power being incommunicable. But if an estate had been given to the trustee by the will, as well as a power, a new trustee might have been substituted under a decree of a Court of Equity.

6th. If the deed or will expressly require that *all the trustees* should join in the receipt for the purchase-money, then it would be impolitic to take a receipt from some of the trustees without employing every practicable expedient to procure the signature of all of them. But if an estate be devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be good discharges for the purchase-money, and they, wishing to be exonerated from the trust, convey to a third person all their estate and interest in the premises for the purposes of the trust, sales or mortgages made by him will be as effectual as sales made by the trustees themselves; and the receipt of such assignee will be equally a good discharge to a purchaser, as the receipt of the original trustees, *Hardwicke v. Mynd*, 1 Anstr. 109, (and see *Lord Braybrooke v. Inskip*, 8 Ves. 417.) where the point was mentioned with a *quære*, et vide ante, 243, *in natis*; because in such cases the receipt will be effectual, by reason of the trust itself, and not on account of any personal confidence reposed by the author of the trust in the original trustee.

7th. If a trustee once accept the trust, he cannot afterwards decline it by his own act and under his own authority, unless there be a power or provision in the deed or will enabling or implying power in him so to do. In one case a trustee assigned his interest to another, who was guilty of a breach of trust; the first trustee was decreed to make satisfaction, because he could not divest himself of the trust at his pleasure. *Anon.* 3 Swan. 79, n. In another case trustees for creditors, who had not been released, were held to continue liable, although the creditors had during eleven years received interest upon their debts from an assignee of the trust property, with whom they had made a new agreement for, and received a higher rate of interest. *Hardwicke v. Mynd*, 1 Anstr. 111. It is now however settled, that a devise to A. B. and C. upon trust, is a good devise to such of the three as accept the trust, and therefore it follows by necessary construction, that the power making the trustee's receipts good discharges must mean the receipt of those trustees who accept the trust; per Vice-Chancellor, in *Adams v. Taunton*, 5 Madd. 438, where it was ruled that a trustee of real estate for sale, who has renounced his trust, and released and conveyed to his co-trustee, is not a necessary party in a conveyance to a purchaser, nor is it necessary he should join in a receipt for the purchase-money. *Ibid.* et ante, 245. If one trustee refuses or declines to act, another trustee may be substituted in his place, under the provision usually inserted for the change and new appointment of trustees: and

OF
DISCLAIMER.

such provision generally stipulates that the new trustee shall and may exercise the same powers as the old one, but, in the absence of such stipulation, the trusts and powers of the settlements do not vest in the new trustee until the legal estate has been conveyed to him, and then only in case the power be reserved to assigns; but the law on most of these points concerning the survivorship and delegation of powers, is still in a very unsettled state, as regards their application to the numerous circumstances arising in practice. If the whole provision be omitted, then a new trustee may be appointed by virtue of the 5th section of the late act, 6 Geo. 4. c. 74, ante, 207 a. The Court of Chancery however will not release trustees from trusts, which they have accepted, without previous inquiry whether they remain accountable for any acts done by them as trustees. But a reference for the purpose of such inquiry may be obtained on motion in a suit which has not been instituted with that particular object. *Osborne Ex parte*, 6 Ves. 455. When a trustee has accepted the trust, the only mode therefore of rendering his concurrence unnecessary in a sale or purchase is, by application to the Court of Chancery for his discharge, and a decree accordingly; et vide 2 Pres. Abs. 224. Hamp. Tr. 102.

8th. If the trustees have accepted the trust, and afterwards one is desirous of being released from the burthen of the execution, or one dies, and it is desired to fill up the original number, the mode generally recommended is, (where there is a provision for the change and new appointment of trustees) for the person in whom the power of appointment resides, to nominate by deed the new trustee, and then for all the continuing or surviving trustees to convey to A. B. an indifferent person, in trust to re-convey to the continuing and new trustees jointly; and this is considered necessary to preserve the unity of title on which the joint-tenancy depends. A. B., by indorsement on the former deed, then re-conveys to the continuing and new trustees, in trust for the purposes of the deed or will. When all the trustees are dead, or not any of them continue, the appointment and re-conveyance of freehold property may be made by the old trustees or the heirs of the surviving trustee immediately to the new trustees, without the intervention of a nominal trustee and re-conveyance. But leaseholds and personal property will require the intervention of a nominal trustee and re-assignment even where all the trustees are dead or discontinued.

Mode of changing trustees under power for that purpose.

Prima facie there is this distinction between executors and trustees; that one executor can, and one trustee cannot, give a discharge, and it may frequently happen, as in *Brice v. Stokes*, 11 Ves. 319, it actually did happen, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees shall join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily; though without taking the controul of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may however be now laid down, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting, but in cases since the rule, that joining alone does not impose responsibility, scarcely two judges agree.—Per Lord Chancellor, 3 Swan. 64. As to the liability and non-liability of trustees to be answerable for the defaults of each other, see 1 Eden, 357. 1 Hanm. Rep. 46. and 2 Sch. & Lef. Rep. 242. Hamp. Tr. 51.

One executor may release, but one trustee cannot.

CHAP. X.

OF THE EQUITY OF REDEMPTION.

Equity of redemption defined, and distinguished from a trust;

AN equity of redemption is defined (A) by Sir Matthew Hale to be "an equitable right (a), *inherent* in the land, binding all persons in the *post* (that is, coming in paramount to, and not

(a) Hard. 465. 469. 1 Sir W. Bl. Rep. 145. [S. C. 1 Eden, 185. 2 Atk. 223.—Ed.]

Equity of redemption illustrated, et vide ante, 109 n.

[251.]

(A) An equity of redemption can be more appropriately illustrated than defined or described. It occurs where an estate is demised for a term of years, with a proviso for making the term void on payment of the sum lent with interest before or upon a certain day. If the money be paid on that day, the condition will then have been performed, and the term will become extinct. But the condition will not at law be considered as having been complied with, if the money be not paid on or before the *very* day appointed for payment. In which case no subsequent payment will annihilate the term; but on the non-performance of the condition the estate and interest of the mortgagee will become absolute at law, and the term irrevocably vested in him; and the mortgagee may immediately enter upon the premises, and continue possession of them during the term or estate granted, without any possibility at law of being afterwards evicted by the mortgagor, "to whom," says the learned Author of the Commentaries, (vol. ii. 158.) "the land will now be for ever dead." S. P. Litt. s. 332. But here it is that Courts of Equity interpose, and consider the real nature of the contract. They look to the actual value of the lands, and compare it with the sums borrowed. And if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recal or *redeem* his estate, paying to the mortgagee his principal interest and expences; for otherwise in strictness of law an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage allowed to mortgagors is called the *equity of redemption*. We should however recollect that a subsequent payment after the time appointed, although it give the mortgagor the equitable right to the estate, yet it will not affect the legal continuance of the term; for that will remain in the mortgagee till re-assigned, or till length of time will presume it surrendered; but it will in equity be considered as vested in the mortgagee for the benefit of the mortgagor, his heirs and assigns, and be considered as a term attendant on the inheritance. And in this place we may observe a distinction between the reversion expectant on a mortgage for years and the equity of redemption, which resides in the mortgagor as a separate right or title from that of the right to the reversion. The equity of redemption, it is true, attaches itself to the reversion (3 Atk. 294), and at all times confers on the reversioner a right

under the title of the mortgagee (B)) or otherwise;" and he says, that, in that respect, it differs from the trust, which is collateral to the land, and created by contract of the party, who may provide for the execution of it; and, therefore, one who comes in in the *post*, and by a title paramount, as tenant by the curtesy (C), or lord by escheat (D), of the *mortgaged estate*, shall be liable to it (D 2). In this, Lord Hale is not singular; Lord Nottingham (MS.) says, an equity of redemption charges the land, and is not a trust (E).

So Lord Hardwicke thought, that, in the eye of a Court of *is the fee;* Equity, the equity of redemption was the fee-simple of the land (b) (F).

(b) 1 Sir W. Bl. Rep. 145. [*Casborne v. Scarfe*, 1 Atk. 603. 605. Et *infra*, 287.—Ed.]

to redeem. But, it is apprehended, the mortgagor may convey away the reversion, and still retain the equity of redemption, though a simple conveyance of the reversion, with a clause of all the estate, &c. would certainly pass the right to redeem.

(B) Claims in the *per* and the *post* may be thus distinguished: to claims in the *per* privity of estate is requisite—to claims in the *post* it is not. Thus the heir in tail comes in not by descent from his ancestor or in the *per*, but *per formam doni*, that is, in the *post*, by a title paramount the estate of his ancestor, namely, by the deed of gift which settled the entail.—For a further illustration of this distinction, see 1 Cru. Dig. 399, 2d edit. (Claims in *per* and *post* distinguished,)

(C) See the distinction between dower and curtesy, *post*, 287.

(D) See note (G), *infra*, 252.

(D 2) But a *bonâ fide* purchaser without notice will be relieved against the mortgage, notwithstanding what is said in *Bacon v. Bacon*, Toth. 133.

(E) And my Lord Eldon, in a late case, said, an equity of redemption was considered as a title in equity, and not merely a trust, from which in many respects it differed materially. *Tucker v. Thrustan*, 17 Ves. 133. What Lord Nottingham meant by an equity of redemption being a charge on the land, is not at this day very obvious. *is a title in equity;*

(F) The person entitled to the equity of redemption is considered as the owner of the land, and the mortgagee as having a mere pledge; and hence it is that a mortgage is considered as personal estate, although the legal estate on the death of the mortgagee vests in his heir. MS. Ca. 2 Eq. Ca. Abr. 594. But it should be kept in view, that when it is said that he who has the equity of redemption is the owner of the land, allusion is made to an equitable ownership; for at law the mortgagor certainly cannot be said to have the legal ownership of the estate. In *Preston v. Christmas*, 2 Serj. Wils. Rep. 86, it was insisted by counsel, that an equity of redemption was a beneficial thing, *is an estate rather than a right;*

may descend, be
granted, devised,
entailed,
and barred;

An equity of redemption will descend, [to the heirs at law of the mortgagor, if it be of real estate, and if of chattels it will devolve on his personal representatives (*bb*)—*Ed.*] may be granted, devised (*f 2*), entailed, and that equitable entail may be barred by [fine and the remainders over, may be destroyed by—*Ed.*] a common recovery (*c*) (*g*).

[*bb*] 2 Pres. Abs. 427. 437. 3 Ib. Ca. 217. *Phillips v. Hele*, 1 Rep. Ch. 289.—*Ed.*]

190. *Pettatt v. Ellis*, 9 Ves. 563.—

(*c*) Hard. 469. [Et vide 2 Eq. Ca. *Ed.*]

Abr. 594. *Roscarrick v. Barton*, 1 Ch.

and that it was not material what the value of it was. But the whole court were clearly of opinion, that an equity of redemption was *nothing at all in the eye of the law*. The mortgagor is, however, by means of a covenant usually inserted in the mortgage deed, and even by the tacit understanding of the parties, entitled to the possession, or rather occupation of the premises, till he makes default in payment of the principal and interest; but the mortgagee may assume the possession whenever he pleases, and therefore it is that the mortgagor is sometimes called a tenant at will to the mortgagee; and in point of possession, he is very similar to that species of tenant, even in equity; for a Court of Equity will never interfere to prevent the mortgagee from assuming the possession. Et vide *Cholmondeley v. Clinton*, 2 Meriv. 359. Et infra, vol. ii. 1151. The truth seems to be, that the interest of the mortgagee before foreclosure is contemplated in a Court of Equity rather as a *right* than as an *estate*, while the equity of redemption is considered as having rather the quality of an *estate* than a *right*. But it is next to impossible to give a definite denomination to the interests either of the mortgagor or mortgagee, when they vary so much according to the light in which they are viewed. See ante, 156, n.(A). In *Lloyd v. Lander*, the Vice-Chancellor said, that the equity of redemption is not an *estate*, but an *interest*, 5 Madd. 290. S. C. infra, 972.

(*F 2*) The contrary was argued in 1 Ch. Ca. 219. 2 Wood, Lect. 151, 152.

may be aliened
by deed.
(Equitable sei-
sin of).

(*G*) In a Court of Equity great regard is paid to the equity of redemption. It is considered as an equitable *estate*, and is alienable by deed. In the case of *Burgess v. Wheate*, 1 Eden. Rep. 225. S. C. Bla. Rep. 121. Infra, 351. it was said by Lord Mansfield, C. J. (who assisted the Lord Keeper in deciding that case) that the equity of redemption was the fee simple of the land; that it would descend; might be granted, devised, and entailed; and that such equitable entail might be barred by a common recovery; which proved that it was such an estate whereof, in consideration of a Court of Equity, there might be a *seisin*; for without such a *seisin* a devise of it could not be good. This observation of Lord Mansfield is introduced to contrast with it a passage in Mr. Watkins's Elements of Conveyancing, p. 118. (Mr. Preston's edit.) where it is said, that a person cannot be *seised of an equity to an use*. The learned Editor of that valuable manual remarks, that although equitable estates are not within the operation of the statute of uses, yet uses declared on a conveyance of the equity of redemption or any trust or other equitable *seisin*;

An equity of redemption of a mortgage continues *prima facie* open until actual foreclosure (d); for, as to length of *continues open till actually foreclosed;*

(d) Ridgw. Rep. 200. Vide infra.

are considered as governing the ownership, so that the releasees are treated as mere conduit pipes, whose concurrence in future conveyances will be wholly unnecessary. And it is worth noticing, as a confirmatory observation, that in many acts of parliament an equitable is considered the same as a legal estate; and the words "seised in law or in equity," in the Qualification Act, shew that the word "seised" is applicable to both species of estate. (See *Shrapnell v. Vernon*, 2 Bro. C. C. 268.) So in the case of *Lord Cholmondeley v. Lord Clinton*, 2 Meriv. 357, the Master of the Rolls considered it clear that there might be what was deemed a seisin of an equitable estate, although there could not be any disseisin of it, because the disseisin must be of the entire estate, and not of a limited and partial interest in it, and because a tortious act could never be the foundation of an equitable title. But see the sentiments of Mr. Butler, argo. as to *quasi* disseisins of equitable interests, 2 Jac. & Walk. 51, 52; and it should be remembered, that Sir T. Plumer, on whose judgment Sir W. Grant's decision was reversed, differed from Sir W. Grant, not only in this, but in most other points of the case.

An equity of redemption on a mortgage in fee will support a tenancy by the curtesy (infra, p. 287), but not a tenancy in dower, infra, 687, 9; and there may be a *possessio fratris* of such an equity of redemption, (infra, 290.) *Curtesy; dower; possessio fratris.*

With respect to escheat, that accrues *ob defectum aut pro delicto tenentis*, and not for want of heirs; consequently there cannot be any escheat of a mere equitable estate. Hence it is the received opinion, that if a *cestui que trust* die without heirs, the lands will not escheat to the lord, but the trustee will be entitled to hold them for his own benefit, because by the death of the *cestui que trust* the trust will be absolutely determined. *Sandy's case*, Hard. 408. 2 Christ. Black. 246, n.(3). 1 Pres. Abs. 147. And this opinion is considered as supported by the great case of *Burgess v. Wheate*, 1 Bl. Rep. 123. But it appears by Mr. Eden's report of that case (1 Ed. Rep. 177), that the court did not give any opinion on the point. It decided that although the *cestui que trust* in that case died without an heir, yet since there was a terre-tenant no title by escheat accrued; but it withheld its opinion as to the right of the trustee. Sir Thomas Clarke, Master of the Rolls (whose assistance the Lord Keeper had requested), put these *queries*:—Suppose the mortgagor die without heirs, shall the mortgagee hold the estate absolutely? And if he demands his money of the personal representatives, shall he have both land and money too? His Honour further remarked, that if the mortgagor died without heirs or creditors, he saw *no inconvenience in the mortgagee's holding the estate absolutely*. In the case of a forfeiture for treason, it was certain the crown might redeem, as in *Sir Salathiel Lovel's case* (post, 284, n.). And as to the supposition, that the mortgagee might demand his money too, that could only be where the mortgagor died without heirs; in which case the demand would be against the personal representatives, by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy *No escheat of equity of redemption.* [253 *] *As to escheat.*

time the mortgagor is entitled to be heard, and may set up many defences to excuse from lapse of time.

will be noticed
in a court of
law;

And the common law will take notice, that the mortgagor has an equity to be relieved in Chancery (*e*), and without doubt,

(*e*) *Thorpe v. Thorpe*, 1 Lord Raym. 663. 2 Vent. 314. Cro. Eliz. 768. 1 Bulst. 41.

P. 253
continued.

against the personal representatives, his Honour thought the court would compel the mortgagee to re-convey, not to the lord by escheat, but to the personal representative; and, if necessary, would consider the estate re-conveyed, as coming in lieu of the personalty and as assets to answer even simple contract creditors. And Lord Mansfield, C. J. (by whom also the Lord Keeper was assisted in his decision of the case of *Burgess v. Wheate*) observed, that if a mortgagee in fee died without heirs, the estate would escheat, subject to the mortgage, and the money would be payable to the personal representatives. But suppose the mortgagor were to die *sans* heir, should the mortgagee hold the land absolutely? If he demanded the money of the personal representative should he have the money and the land too? If not, to whom should he convey it? If to the king, then a right of escheat would have followed in equity by analogy. And the Lord Keeper (Northington), after hearing and considering the opinions of the Master of the Rolls, and the Chief Justice, said, (1 Bl. Rep. 184) "If a mortgagor die without heir, shall the mortgagee hold the land free? I answer, shall it escheat to the crown? No; because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor I shall not trouble myself about. I think the crown has not an equity on which to sue a subpoena."

Rules as to es-
cheat of equity
of redemption.

From these observations of the learned judges we may collect, 1st. That if there be a mortgage in fee, and the mortgagor dies, leaving neither heir nor devisee, the equity of redemption will not escheat to the lord, but the mortgagee will be entitled to the estate absolutely discharged of the mortgage. This however is not clear law, and most of the text writers state it with a *quere*. See 3 Cru. Dig. 461. 7 Ib. 144, 2d edit. and 2 Thom. Co. Litt. 196, in *notis*. 2d. That if in this case the mortgagee demand his money of the personal representatives of the mortgagor, the mortgagee must then submit to be redeemed by the executor or administrator, and equity will, if necessary, compel the mortgagee to re-convey to them. 3d. That if the mortgage be for years, the reversion will escheat to the lord with the rent and remedies of a reversioner annexed. (Nels. Rep. 117.) But his right to redeem will depend on the demolition of the generally received rule, that an equity of redemption will not escheat. 4th. If the mortgagee in fee in possession die without an heir or devisee, the legal estate will escheat to the lord, but the mortgagor will be entitled to redeem the premises in his hands, paying the money to the personal representatives of the mortgagee. Per Lord Mansfield, *ubi supra*. But this is different from the case of a trustee having the legal estate, dying without heirs; for there it seems the legal estate will

a release of an equity of redemption is a very good consideration to maintain an assumpsit; for a court of law will take notice of a suit in Chancery; and an assumpsit, in consideration of desisting from exhibiting a bill in Chancery, was held to be on a good consideration (H).

But it seems that an equity of redemption is not extendable within the stat. of 29 Car. 2. c. 10. (I)

cannot be taken in execution, p. 255, n. (K) at least as to leaseholds.

This was adjudged on an equity of redemption of a term for years, in the case of *Lyster v. Dolland* (f). There two persons, joint-tenants of leasehold premises, joined in the mortgage of them, and also in a bond to the mortgagee by way of collateral security. The mortgagee filed a bill of foreclosure, and pending that, and, while he was in possession by ejectment

(f) 1 Ves. jan. 431. 3 Bro. Ch. Ca. 480. 478. [Et vide infra, 612.—Ed.]

escheat to the lord discharged of the trust, because he comes in in the post. *Peachy v. Somerset*, 1 Stra. 454. 2 Fonbl. Trea. on Eq. 169, 5th edit. 1 Pres. Abs. 147. But we have seen (ante, 250, 1) that an equity of redemption will bind all persons in the post, and consequently the lord by escheat.

For more on escheat, see 10 Vin. Abr. 186. 8vo. edit. 139. Com. Dig. tit. *Escheat*, 3 Kidd's edit. 549. Cru. Dig. tit. XXV. *Walker v. Denne*, 2 Ves. jun. 170. 176. *Wragg, Ferne, and Webster*, respectively *Ex parte*, 5 Ves. 450. 832. 6 Ves. 809. *Moggridge v. Thackwell*, 7 Ves. 71. *King v. Smith*, App. Sug. Vend. & Purch. 24. S. C. Wightw. Rep. 34. *Doe v. Redfern*, 12 East, 96. 39 & 40 Geo. 3. c. 88. s. 12. *Fawcett v. Lowther*, 2 Ves. 300. Belt. Sup. 348, 9. *Williams v. Lonsdale*, 3 Ves. 752. 1 Ves. 302. Other cases on escheat.

(H) But note, the release of an equity of redemption will not be a good consideration for a contract if the mortgage be of the full value of the estate; for then it will not be valuable. Hoit, Chief Justice, however, said, that then it would not be a mortgagee. 1 Ld. Raym. 663. Et vide Bl. Rep. 820. Cowp. 294. Com. Dig. *Action of Assumpsit* (B), vol. i. 138, 2d edit.

Is a good consideration for contract.

(I) By this statute it is enacted, that it shall be lawful for every sheriff or other officer to whom any writ shall be directed, at the suit of any person upon any judgment, statute, or recognizance, to deliver execution unto the party in that behalf suing, of all such lands, &c. as any other person shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff might or ought to have done, if the said party against whom execution shall be so sued, had been seised of such lands, &c. of such estate as they be seised of, in trust for him, at the time of the said execution sued. Same section, post, 603.

Stat. 29 Car. 2. c. 3. s. 10.

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brought upon his mortgage, he sued upon the bond, and took the mortgaged premises in execution, and they were sold by the sheriff to a trustee for the mortgagee; but it was not suggested that he purchased them unfairly. *Et per* Lord Chancellor: If the fact is, that the obligee, having a pledge in his hands, has brought an action against the obligor, and has taken the pledge in redemption, he takes only the equity of redemption under the statute of frauds; *which, but for that statute, could not be taken in execution.* If he had got a foreclosure, and had afterwards brought an action, and sold it for 5*l.* he would have opened his foreclosure again. I do not think he could have sold it to a stranger. If that offer was made, I would give it all weight. What is to become of the principal case, and the case put in that way, are two different things. But it is new to me that this case obtains in mortgages. Under the statute, the sheriff may extend an equity; but then the vendee of the equity is in the same case as the defendant in the action, and must proceed as cases in action must, and must make it good by the same means as the defendant must; for it is an extent of a thing in action. I will give my opinion to-morrow.—On the next day his Lordship said, upon looking into the statute, I do not think this is within it. The words are upon every statute, recognizance, or judgment, the sheriff shall deliver in execution to the party any lands, tenements, hereditaments, rectories, rents, or tithes, held in trust for the defendant, just as if he had been actually seised or *possessed* of the same. Here it is impossible he can be seised. Upon reading the statute, I thought we were all mistaken yesterday. I do not think the statute touches it at all. I imagined the words were much larger, and that the words “equitable interests” were contained in it, but found myself wrong. And his Lordship decreed that the plaintiffs should be let in to redeem. And in Brown’s report of this case, he says, he was informed that the Lord Chancellor made his decree on the ground “that an equity of redemption was not liable to be taken in execution under the statute 29 Car. 2. c. 3, and desired that might be taken notice of as the ground of the judgment.” (K)

Neither equity
of redemption,

(K) And this seems to have been said by the Chancellor with reference to all cases, and not merely to the particular case before the court. In *Scott*

A covenant in mortgage for further assurance does not oblige a mortgagor to release his equity of redemption, but *not to be released by covenant for further assurance;*

v. Scholey, 8 East, 466, and *Metcalf v. Scholey*, 2 New Rep. 461, it was decided by the Courts of King's Bench and Common Pleas, that a mere equitable interest in a term of years, could not be taken in execution by the sheriff, under a writ of *fiery facias* at the suit of a judgment creditor. It is true that was not exactly the case of an equity of redemption. But it seems to have been successfully contended at the bar of the King's Bench, that though it was not the case of a mortgage, yet that it ought to be governed by the same rule, it being a charge to pay off debts, and the debtor having only a resulting equity in the surplus after the debts were paid, and the rule as to an equity of redemption being acknowledged on all hands. *nor equitable interests in leaseholds may be taken in execution.*

Lord Ellenborough, in delivering the judgment of the Court of King's Bench in the first-mentioned case, observed, that the language of the writs [of *venditioni exponas*, and the return and subsequent process of those writs, 8 East, 474,] evidently imported that the goods and chattels which were the object of them, were properly of a *tangible* nature, capable of *manual seizure*, and of being detained in the sheriff's hands and custody, and such also as were conveniently capable of sale and transfer by the sheriff, to whom the writ was directed for the satisfaction of a creditor. No single instance could be found in the history and practice of the courts of common law, in which an equitable interest in a term of years had ever been recognized as saleable (seizable of course it could not be) under a *fiery facias*. Besides, what locality belonged to an equitable interest, a resulting trust for instance in a term for years, so as to render it more fitly the subject of execution and sale by the sheriff of any one county than another? and what means in any degree adequate had the sheriff of taking an account of the actual amount of the incumbrances upon such an interest, or of ascertaining the extent of the indemnities which the trustees might be entitled to claim? The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value, than attend sales of any other description of property; and not only without the means of delivering a present possession of the thing sold, but in general without having even the type or instrument of any legal interest whatsoever, present or future, in the subject of such sale, to exhibit to the sight, or deliver to the hands of a purchaser. It had, indeed, continued his Lordship, been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests should be held not to be saleable under an execution; that by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor. But the inconvenience in the case put, did not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by the judgment creditor in such other court for the purpose of obtaining it. In a court of equity, he might be let in to redeem such mortgage incumbrances as stood in the way of his *Reasons for that rule.* [256 *] *Objections against it answered.* *Judgment creditor may redeem or have*

only to make such further assurance of the land, &c. under the

decree for sale
of term.

Lyster v. Dol-
land confirmed.

Comparative
view of 10th
section of stat.
of frauds.

common law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. *Shirley v. Watts*, 3 Atk. 200, (post, 271. 610,) was an authority for that purpose, as was also the case of *Burdon v. Kennedy*, 3 Atk. 759, (post, 263. 281. 609.) In *Lyster v. Dolland*, Lord Thurlow was at last of opinion, that an equity of redemption of a term could not be taken in execution, though at first, under an apprehension that the 10th section of the statute of frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduced a new provision in respect to *lands and tenements* held in trust for the person against whom an execution was sued, said nothing as to trusts of chattel interests, afforded a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both *freehold and leasehold trust interests* equally stood prior to the passing of that statute.

Prior to the passing of the statute of frauds, we shall hereafter see (pages 601. 603.) that neither uses nor trusts of freehold or leasehold property could be touched by the judgment creditor; for the statute of Westm. (post, 601,) which gave an execution to the creditor, extended only to lands at the common law, and not to uses and trusts. It seems, indeed, to have been early allowed and settled, that at law, prior to the statute of uses, 27 Hen. 8, the writ of *elegit* would not reach freehold lands in use for the debt of the *cestui que use*; and as trusts are now what uses were then, it continues to be law to this day, that trust estates cannot, by the common law, (except so far as that common law has been enlarged and extended by the statute of frauds) be subject to the judgment creditor. The law then stood thus, prior to the passing the act under consideration:—A moiety of the freehold lands not in use or trust might have been extended by the judgment creditor under an *elegit*, and the whole of the leasehold property of the debtor not in trust might have been taken in execution by the judgment creditor under a writ of *fiery facias*; but with respect to uses and trusts, these were not subject to execution, neither at the common law nor by the statute of Westm. Then came the statute of fraud (29 Car. 2. c. 3. s. 10.) and subjected uses and trusts to the execution of the bond and judgment creditor.

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Equity of re-
demption not
extendable in
any case at suit
of subject, con-
tra at suit of
crown.

On the interpretation of this statute, we have seen that it has been expressly decided, that the equity of redemption on a mortgage of leasehold property, cannot be taken in execution by the sheriff under a writ of *fiery facias*. With respect to equities of redemption on mortgages of freehold property, it hath not been definitively held, that an equity of redemption on a mortgage in fee is not within the 10th section of the statute; but it may be contended (and it is presumed with great probability of success, especially on a comparison of the tenth with the three preceding sections of the statute), that this 10th section of the act does not extend to implied or constructive trusts of any kind, and consequently not to an equity of redemption on a mortgage in fee, which is a constructive title rather than a "trust." Lord Thurlow, however, is reported to have said, in *Lyster v. Dolland*, "If this had been a mortgage in fee, he [the judgment creditor] could only have ex-

same conditions as in the mortgage; [and though the cove-

tended it to hold *quousque*;" that is, until the mortgagee took possession of the estate. But, says Mr. Sanders, in his Treat. on U. & T. (vol. i. p. 219, 3d ed.) "it seems impossible to contend, that under the statute of Frauds, the sheriff can deliver an equity of redemption upon an execution in a suit against the mortgagor." And it is worthy of notice, that in the case of *Plunket v. Penson*, 2 Atk. 290, where the mortgage was in fee, Lord Hardwicke is stated to have said, he should be glad to be informed whether there was any instance where an equity of redemption had ever been held to be liable to the execution of a bond creditor in the life-time of the mortgagor? To which the counsel in the cause answered, that they did not recollect any such instance.—These observations, so far as they go to shew that the equity of redemption on a mortgage in fee cannot be taken in execution, have been in a great measure confirmed by the present Vice Chancellor, in the case of *Forth v. Duke of Norfolk*, 4 Madd. Rep. 504. 1820:—"A judgment creditor," his Honour there remarks, "has at law by the statute of Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if he has left a partial interest only [as an equity of redemption], the judgment creditor has no execution at law, though he may come into a court of equity, and claim there the same satisfaction out of the equitable interest as he would be entitled to at law if it were legal." In reference to mortgages of freehold property for terms of years, the equity of redemption in that case will not be extendable at the suit of creditors of the mortgagor, any more than in the case of an equity of redemption on a mortgagee in fee, though it should seem a moiety of the reversion expectant on the term, may be extended with a *cesset executio* during the term. 1 Rol. Abr. 894, pl. 5. Bro. Abr. Execution, 143. 3 Leon. 113. *Bishop of Bristol's case*, Moor, 36. Serjeant Williams's note to Saund. Rep. 69. *Girling v. Lee*, 1 Vern. 63. Co. Litt. 153 a. But Mr. Butler in his note (4) observes "yet it has been said that the reversion itself is not extendable," citing Bro. Non. Ca. pl. 227. 1 Rol. Abr. 888, pl. 6 and 7. Mod. 40. and Carth. 126.—*sed quare* Mr. Butler's observation. But although equities of redemption may not be taken in execution at the suit of the subject, yet may they at the suit of the crown. 3 Pres. Abs. 353, quoting *King v. Smith*, App. Sug. Vend. & Purch. 24. [S. C. Wightw. Rep. 34.] Hence, therefore, an equity of redemption is subject to crown debts, and may be sold under an extent. See 25 Geo. 3. c. 35. *King v. Delamotte*, Forr. Rep. 162.

Equity of redemption subject to crown debts.

Lastly, it is observable, that a judgment creates a *general lien* on the equity of redemption, and the judgment creditor may redeem, post, 263. 271. 2 Fonb. 168. In fact the judgment creditor, according to the present received practice of the courts, has no other way (except in the case of legal assets, post, 318), whenever his judgment in point of time is a lien on the equity of redemption, of availing himself of the benefit of that lien, than by resorting to a court of equity. But a judgment or bond creditor, before he can come into a court of equity to claim the redemption of a mortgage on a leasehold estate, must have taken out execution; for till then his bond or judgment will not have created any lien on the property. *Shirley v. Watts*, 3 Atk. 200, post,

How judgment creditor can acquire benefit of equity of redemption;

nant be for the *absolute* sure making, &c. yet it will be the same; and a warranty will not be allowed in such further assurance.—*Ed.*] (g) (L).

Will pass without livery of seisin (N), being in fact only a title to redeem.

There is no occasion that a mortgagor should be in possession, or execute the deed on the land, in order to transfer or assign the equity of redemption. No legal title passes, nor is any right to the *present possession* transferred, but merely a *title to redeem*; consequently it is a distinct thing from the conveyance of the *legal estate* in the lands, where the grantee is supposed to be in the enjoyment, and a right will not pass, if the possession or enjoyment is withholden in an adverse way (N).

(g) *Atkins v. Urton*, 1 Lord Raym. 36. S. C. Comb. 318.

271. 609. As between different creditors, it is observable, that the rule *qui prior est tempore potior est jure* applies; so that if there be two writs of execution delivered to the sheriff at different times, the first will have priority, and be entitled to redeem, though the last be in part executed. *Hutchinson v. Johnstone*, 1 T. R. 729. S. P. *Payne v. Drew*, 4 East, 543. Et vide 2 Marsh. Rep. 374.

Covenant for further assurance.

(L) Accordingly, *Spencer v. Boys*, 4 Ves. 470. There Rachael Boys and her son conveyed copyhold lands to a mortgagee by lease and release (mistaking them for freehold), and covenanted for further assurance. The son died, and the mortgagee filed a bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff. The Master of the Rolls (Sir R. P. Arden) said, he was clearly of opinion this covenant was a contract for a valuable consideration affecting the land, and would affect the heir: and by the decree it was declared, that the covenant in the mortgage deed bound the land descended to the defendant.

(M) As to the seisin of an equity of redemption, see ante, 252, note (G).

Mode of conveyance of equity of redemption.

(N) Before we quit the subject of this chapter, a few observations seem requisite with regard to the mode of conveying an equity of redemption to a purchaser. An equity of redemption is an assignable interest, and not a mere *chose in action*. *Blake v. Johnstone*, Pr. in Ch. 143. It is an *estate* in the land, possessed by the mortgagor in virtue of his ancient and original right, without any change of ownership. We have seen in a former note (ante, 252, note (G),) that there cannot be a seisin of an equity to a use, though for all substantial purposes there may be an *equitable seisin to a use*, and the use will be considered as governing the ownership; the releasee to serve the use being treated as a mere conduit pipe. The consequence of this position is, that in the conveyance of an equity of redemption to a purchaser (whether a stranger or mortgagee), by indentures of lease and release, the bargain and sale for a year will be totally inoperative; for the subject of it being an equity, no use

will arise on the seisin of the bargainor, and the statute consequently cannot transfer any possession to the bargainee who has not any use to which that possession may be annexed: but the release will operate with respect to the equity as a mere or proper release, just as it would have done without such a bargain and sale or lease for a year preceding it.

To a proper developement of the subject under consideration, it should be viewed in its different aspects, 1stly, as it regards the conveyance of an equity of redemption on a mortgage in fee to a purchaser; 2dly, as it regards such a conveyance to the mortgagee; 3dly, as it regards the conveyance of an equity of redemption on a mortgage for years to a purchaser; and 4thly, as it regards such a conveyance to the mortgagee. With respect to the first case, it is observable, that as an equity of redemption cannot be made the subject of a statutable use, the most formal and scientific method of conveying this species of property to a purchaser is by *grant or assignment*; for it cannot pass or be affected by a bargain and sale, covenant to stand seized, lease and release, or feoffment; though as to this latter species of assurance, it is necessary to apprise the student that a feoffment by the mortgagor in possession will pass the fee and disseise the mortgagee, except so far as by payment of interest, or other recognition of the estate of the mortgagee, the feoffment may be impeached as fraudulent within the principle which governed the court in *Fermor's case*, 3 Co. 77. But notwithstanding a lease and release of this species of interest will, as such, be wholly inoperative, yet it is generally resorted to as the preferable mode of assurance to obviate any difficulty which a defect in the mortgage deeds might occasion; for if any legal freehold interest or estate be left in the mortgagor through the inefficiency of the mortgage assurance, then the bargain and sale for a year will operate on such legal interest or estate, and the release will operate by enlargement to pass it to the purchaser; and as to every other equitable interest or estate remaining in the mortgagor, the release will (whether it have any operation as a conveyance by enlargement or not) substantively pass such equitable interest and estate to the purchaser by means of the word "*grant*," which is usually inserted in it, and even without that word it should seem the equitable estates and interests will be transferred; for independently of the general doctrine that a deed may be pleaded in such a manner as will best effectuate the intention of the parties, the release will furnish evidence of a contract in equity; and the learned editor of *Watkins' Elements of Conveyancing* (p. 118,) has observed, that an equity of redemption may be transferred by *mere contract*.

Conveyance of equity of redemption on mortgage in fee to purchaser.

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If in conveying the equity of redemption to a purchaser the mortgagor be desirous of making a reservation of mining or other liberty on the land, he should first procure a conveyance of the legal estate from the mortgagee to himself, and then execute a regular conveyance of the fee to the purchaser, excepting such rights and liberties as are required; for otherwise the reservation, not being made to a person who has the legal estate, cannot at law be maintained against the purchaser. This was decided by Lord Ellenborough in an action of trover, brought by the mortgagor on the following case:—Many years ago a mortgagor and mortgagee of certain manors and lands in fee conveyed the same, and all their estate, &c. by lease and release to a purchaser. In the conveyance was contained a covenant from the pur-

Reservation to person having equity of redemption only, void at law.

chaser, that it should be lawful for the mortgagor, his heirs and assigns, to enter and dig for coals and other minerals, and to take the same to their own use, with a covenant also by the purchaser, that he would permit the mortgagor and his heirs to hunt on the land for game. The mortgagor and persons claiming under him continued to enjoy the privilege of digging coals for upwards of sixty years. When a question arose whether the defendants (who were proprietors of an adjoining mine) had not dug and carried away coals which belonged to the plaintiff (who represented the mortgagor), as being extracted from under the lands over which the said covenant and exception rode. A notice was given by the plaintiff to the defendants not to dig for coals so situated. But the defendants after such notice excavated considerable quantities of coal from the mine in question, and converted the same to their own use; for which an action of trover and conversion was brought by the plaintiff. At the trial it was argued for him, that the covenant entered into by the purchaser to permit the mortgagor and his heirs to enter and get coals was a reservation and exception out of the estate conveyed by the mortgagor, and gave him and his heirs an *exclusive* right to the coals, and not a right merely concurrent with the purchaser and his heirs. But Lord Ellenborough stopping the counsel for the defendant, said, this case involved no point of difficulty. *In contemplation of law the mortgagor was a perfect stranger as to any legal estate, and therefore could neither grant the legal estate, nor consequently reserve to himself any thing out of it.* How it might have been if there had been a livery of seisin or a feoffment by the mortgagor and he had passed the legal estate, it was not then necessary to decide; but that circumstance made the distinction between this and *Lord Mountjoy's case*, Anders. 307. [S.C. 174. Godb. 17. 4 Leon. 147. Cro. Car. 207. Dy. 276. Co. Litt. 47. 143. Shep. Touch. 77.] for he (Lord Mountjoy) was seised of the *legal estate*, and reserved out of that legal estate a liberty to himself to dig and carry away *alum*. In the case before the court the plaintiff had *not an exclusive right* to the whole, but only a *liberty*. Judgment therefore was given for the defendants. *Cheetham v. Williamson*, 1 Smith. Rep. 278. So in a late case where a plea stated that A. was entitled to the equity of redemption, and that subject thereto B. was seised in fee, and that they by lease and release granted the premises, except and reserving to A. his heirs and assigns, a liberty of hunting, it was held, that as A. had no legal interest in the land there could be no reservation to him. *Moore v. Plymouth*, 3 Barn. & Ald. 66.

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Conveyance of
equity of re-
demption on
mortgage in fee
to mortgagee.

2dly. With regard to a conveyance of the equity of redemption on a mortgage in fee to the mortgagee, we have previously had occasion to remark (ante, 122, note (N),) that no legal impediment exists to prevent the mortgagee from purchasing the equity of redemption of the mortgagor, and now with respect to the mode of carrying such contract into execution, it is observable that a mere release indorsed on the back of the mortgage-deed will be a sufficient assurance, for by that means the equity of redemption, if conveyed to the mortgagee, will become merged and annihilated in the legal estate, and the mortgagee will be seised of the fee-simple, discharged of the mortgage. An indorsement of this kind is frequently effected by deed poll; but as it will be proper that there should be covenants with the purchaser, that no act has been done to incumber, and for further assurance, an indenture seems to be the appropriate form. In which case a separate

deed will be found more convenient than an indorsement on the mortgage assurance. But it is proper to remind the student, that in a case of this kind, a release alone is rarely relied on; a lease and release is more usually adopted for the sake of caution, and in analogy to the common practice of conveyancing.

3dly. In the instance for a mortgage for years, the mortgagor has both the equity of redemption and the reversion expectant on the term. *Amburst v. Litton*, Fitzg. 99. S. P. Park on Dower, 140, et ante, p. 251, note (A). In a late case, however, the Barons of the Exchequer held, that if *A.* have the fee-simple of lands, and mortgage them for a term of one thousand years, he will no longer have any estate or interest in the premises *higher than a right to redeem*; that the mortgagee will have the legal estate, but the mortgagor *only an equity of redemption*. *Rex v. Abbott*, 3 Pri. 195. And a similar point seems to have been hinted at in *Marks v. Marks*, 10 Mod. 423. This, it is presumed, must be understood not as denying the existence of a reversion but as applying solely to the consideration of the relation between the mortgagor and mortgagee. The reversion, it is true, forms no part of the mortgage transaction, and in ascertaining the estate and interest of a mortgagor, it would not be strictly correct to say, that he has also a reversion, for he has not the reversion in virtue of his character of mortgagor, but as tenant of the fee-simple. Taking this to be the probable meaning of the Court, we proceed to observe, that a sale of the equity of redemption is generally understood to comprehend a sale of the reversion also. As to the equity of redemption we have seen that it may be transferred by mere contract, grant, release, or assignment, either to the mortgagee or a stranger, but that a lease and release is generally preferred. With respect to the reversion, *that* can be properly conveyed by grant only, but it is more commonly passed by lease and release, in order that the releasee may have in his own hands the means of shewing that there was a particular estate. In which case the conveyance by lease and release may combine a transfer of the equity of redemption and a grant of the reversion also in one deed. The reversion will pass by the general words. No other particular description will be necessary.

Conveyance of equity of redemption on mortgage for years, to purchaser.

4thly. When the mortgagee for years purchases the equity of redemption, it is usual to recommend that the conveyance should in this case also be by lease and release. A mere release to the mortgagee would operate in enlargement of his estate and extinguish his term. But it is apprehended it would have this effect only in case he had entered on the premises; for till then he will have had nothing but an *interesse termini*, which would not be sufficient to support a release by enlargement. Litt. s. 459. Co. Litt. 46 b. 270 a. The term too is usually assigned to a trustee to attend the inheritance preparatory to a conveyance of the equity of redemption, in which case the mortgagee would not have any estate to enlarge.—On the whole, therefore, a decided preference seems conferred on a lease and release, as the best mode of conveying an equity of redemption in every case. A form of this species of assurance will be found in the Third Volume, with variations.

Conveyance of equity of redemption on mortgage for years, to mortgagee.

A few words appear necessary, in this place, as to the mortgage of an equity of redemption. A second mortgage should invariably be in fee; but it is at all times a very ineligible security. If the equity of redemption be-

Mortgage of equity of redemption.

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long to a woman, her husband (if any) may be entitled to curtesy, and for want of the legal estate the second mortgagee cannot bring an ejectment, or pursue any other legal remedy for payment of his money out of the land, but in all cases he will be driven to a court of equity, even to obtain the payment of his interest. He may indeed sue the mortgagor on his personal covenant for payment of the principal money and interest; but if the mortgagor be in indigent circumstances, even this plank will be of little avail to him. Besides, the first mortgagee may subsequently to the second mortgage, and without notice of it, make further advances to the mortgagor, which he will be entitled to tack to his original mortgage in preference to the subsequent mortgagee, and a third mortgagee without notice of the second, may buy up the first mortgage, and oust the second mortgagee of his security completely. The mortgagor also may secretly have made a previous mortgage or disposition of the equity of redemption, against which no caution or inquiry can protect, for the rule is, *qui prior est in tempore, potior est in jure*. There is, however, one case where the mortgage of an equity of redemption may be accepted, and that is, where the mortgagee advances his money without having notice, *at the time of his mortgage*, of any previous incumbrance, and can get in a term for years prior to the first mortgage; for the acquisition of such term will give the second mortgagee the legal estate, and consequently a preference even to the first incumbrancer. Of this more will be said hereafter, as also of the effect of notice given by the second mortgagee to the first legal incumbrancer, immediately on the execution of his mortgage.

A form of a second and third mortgage will be found in the Third Volume.

CHAP. XI.

WHO MAY CLAIM THE EQUITY OF REDEMPTION (A).

AS the mortgagor may, at any reasonable time, call upon the mortgagee to permit him to redeem, so likewise may any person claiming interest under him (B).

Mortgagor, and all claiming under him, may redeem.

(A) This Chapter contains—1st. An enumeration of the persons who may redeem, from 261 to 311. 2d. A consideration of the modes of contribution by a tenant for life, when the incumbrance is paid off by him and the remainder-man, from 311 to 314. 3d. A statement of the law as to exoneration when the incumbrance is discharged by a particular tenant, as by a tenant for life or a tenant in tail, and herein of a redemption by a daughter against a posthumous son, from 314 to 318. 4th. A description of the cases wherein the equity of redemption is considered assets, from 318 to 330. 5th. An inquiry whether there may be a *possessio fratris* of an equity of redemption, in page 330, 1. 6th. An investigation of the title necessary to be shewn on coming to redeem, from 330 to 335. 7th. An account of certain rules in equity as to redemption, from 335 to 338. 8th. A view of the equity, where there are two mortgages on separate estates, or a defective further charge, from 338 to 343. 9th. An explanation of the rules as to buying in incumbrances, from 345 to 347. 10th. A consideration of the cases on tacking, particularly with a view to the tacking a bond to a mortgage, from 347 to 359. 11th. A solution of the period which will effect a bar to the equity of redemption, and herein of Welch mortgages, from 380 to 402. 12th. A survey of the necessary parties to a bill to redeem, from 402 to 405. And lastly, a reference to the subject of clandestine mortgages, from 405 to the end of the chapter.

Contents of chapter.

(B) Per Comyns, B. in delivering the judgment of the Court of Exchequer, in the case of *Jones v. Meredith*, Com. Rep. 670. But it is not requisite that such person claim by express assignment from the mortgagor, for his heir or executor may redeem as well as his assigns. So a tenant in dower, and a tenant by the curtesy, whose estates are created by act of law, may redeem, ante, 190, *in notis*, and 287, *infra*. The ground for redemption seems to be, the having an interest in or lien upon the land. He that has such interest or lien may redeem; he that has none cannot. Therefore, if a man enter into a bond, in which he binds himself and his heirs, and dies, leaving real estate to descend to his heir, subject to a mortgage for years, and the heir sells the equity of redemption, the obligee cannot redeem the mortgage without having first obtained a judgment at law against the heir, for till then he will not have had any lien on the estate. *Bateman v. Bateman*, 1 Eq. Ca. Abr. 315. But an equitable lien will entitle the incumbrancer to a redemption; as if a man on his marriage, article that certain lands shall be settled on his wife for

Lien on land, either legal or equitable, confers right to redeem.

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Bond.

Articles.

Grantee under
voluntary gift
may redeem.

And, therefore, where a man made a voluntary deed, and afterwards mortgaged the same lands, and the *first deed*, on trial at law, was found fraudulent against the mortgagee (a); yet, on a bill exhibited by the person to whom the deed was made to redeem the mortgage, it was held, that, though the first deed was fraudulent, because voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would pass that; for a voluntary deed would bind the party that made it, and his heirs.

So may assignees of bankrupt.

Assignees of a bankrupt may redeem, or assign an equity of redemption (b) (c).

(a) *Rand v. Cartwright*, 1 Cha. Ca. [For more on volunteers, see ante, 59. *Howard v. Harris*, 1 Vern. 193. 166, in notis.—Ed.]
Nelson, 101. 1 Eq. Ca. Abr. 315. (b) *Drake v. Mayor of Exeter*, 1 Ch. Barthrop v. West, 2 Rep. Ch. 62.— Ca. 71.

life, with divers remainder over, and afterwards mortgages the same estate to one having no notice of the articles, and dies, his widow, having an equitable estate for life, will be entitled to redeem; for by the articles she will be considered in equity as a purchaser. *Haymer v. Haymer*, 2 Ventr. 343. Infra, 281.

Assignee of partial interest may redeem.

It is further observable, that an assignee of *part* of the estate, or an assignee of a *partial* interest in the equity of redemption, may redeem the *whole* mortgage, as in the case of a redemption by a dowress, a jointress, a tenant by the curtesy (post, 283, 7), and indeed as in the case of a redemption by almost every subsequent incumbrancer, and if there be two such assignees, who cannot consequently both redeem, their preference to redemption will be decided by the rule, *Qui prior est tempore potior est jure*. In *Spragg v. Binkes*, 5 Ves. 587, the Master of the Rolls put to himself this difficulty: "My doubt is, whether the Court, though they do permit equitable interests to be assigned, will not require that they shall all come together, otherwise a man may make twenty different assignments, and each assignee will be entitled to redeem." The assignee who files his bill first, will undoubtedly be entitled to preference, but he will not be allowed to redeem *pro interesse suo*, for, by a subsequent decision (12 Ves. 59) it is stated to be now clearly settled, that a subsequent mortgagee redeeming a prior one, must redeem him entirely, or not at all, paying the whole sum due, and putting himself completely in his stead, and that though the second mortgage be only of *part* of the estate comprized in the first mortgage, and under a different title. *Palk v. Clinton*, 12 Ves. 48.

Bankrupt cannot redeem, but insolvent debtor may. (N.W.)

(C) And that before a bargain and sale of the bankrupt's real estate has been executed to them from the commissioners. *Lloyd v. Lander*, 5 Madd. 290. This is on the principle, that all equities of the bankrupt vest in the assignees,

So, likewise, a tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it (c) (D). Lessee may redeem.

Where one agreed to leave his wife 1000*l.* if she survived him, and a bond was given by him to her to secure it; she was decreed in equity to have the benefit of the bond, although released at law by the marriage, and let in to redeem a freehold and copyhold estate mortgaged (d) (E). Bond creditor may redeem, though released at law.

(c) Dougl. Rep. 22. *Heech v. Hall*, (d) *Acton v. Pierce*, 2 Vern. 480. supra, 156. [S. C. post, 683, 4.—Ed.]

for which see note (3), ante, 193. The cases of *Hitchcock v. Sedgwick*, 2 Vern. 161, and *Pope v. Onslow*, ib. 286, are also in point, and shew that the assignees are entitled to the equity of redemption, and may redeem. But the assignees of a bankrupt cannot be in a better situation than the bankrupt himself; they are therefore liable to all equities that would attach upon the estate in his possession. *Saunders v. Leslie*, 2 Ball & Bea. 515.

The bankrupt himself cannot redeem, for all his interest has been assigned to the assignees, and no primary equity resides in him. If the equity of redemption be a surplus to which he is entitled, he cannot sue for a redemption in his own name, but must resort to the assignees for their concurrence, in whose name the suit and proceedings must be commenced and continued. If they refuse to lend their assistance to the bankrupt, he may (after having offered them an adequate indemnity) compel them to concur in redeeming the mortgage for his benefit, by petition to the Chancellor. *Spragg v. Binks*, 5 Ves. 587. But an insolvent debtor, who is entitled to an equity of redemption as a surplus after payment of his debts, may in his own name file a bill to redeem. Per Master of the Rolls, ib. 589.

(D) And that, although he be lessee of the mortgagor only after the mortgage made. 2 Cru. Dig. 110, 2d edit.

(E) A bond does not bind a copyhold estate, yet it was said, that as the freehold and copyhold premises were both in one mortgage, the widow should be entitled to redeem the whole. The peculiarity in this case arose from the circumstance of the parson of the parish having been employed to draw the marriage agreement, and he made the bond from the intended husband to the intended wife, which bond, by the marriage, became void at law (Co. Litt. 264 b.) but not in equity, for there the husband and wife may sue each other. *Cannel v. Buckle*, 2 Pr. Wms. 243. *Watkins v. Watkins*, 2 Atk. 96, 97. The case of *Acton v. Pierce*, ubi supra, seems to be the same with that in Salk. 325, where Holt, C. J. is said to have differed in opinion from Gould and Turton, Justices, the former holding that the bond was absolutely extinguished on the marriage, the latter, that it was but suspended, and that it revived on the death of the husband, but the Chief Justice allowed that if it had been a covenant or a promise made to the wife *dum sola*, to make a provision for her in

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This is quite wrong. The M.R. said he intended was the same as a bond.

Bond not binding on copyholds. How affected by marriage.

Assignee of equity of redemption abandoned for fifteen years, may redeem.

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And an assignee of the equity of redemption, which has been deserted for a time, but not that period which is a bar to a redemption, will (e), if there are circumstances which would induce the court to decree a redemption in favour of the mortgagor or his representative, be entitled to the benefit of it. Therefore Lord Hardwicke (f), in a case, where a prowling assignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconsiderable sum, imagining, that from some knowledge of the law, he might be able to unravel a great number of circumstances, and, by that means, entitle himself to a redemption, was of opinion that he was entitled to a decree to redeem.

Observations on last case.

But though Lord Hardwicke decreed a redemption in the last-mentioned case, he did it only upon terms, which were,

(e) Vide infra, 360.

(f) Anon. 3 Atk. 314.

P. 263 continued.

case she survived her husband, these, in regard they would have been executory and have raised no present duty, would have been good, they would have depended on a future contingency, which could not have happened during the coverture. For other points on the effect of the husband's release of his wife's *choses in action* in remainder or expectancy, which may possibly fall in during the coverture, see 2 Rep. Bar. & Feme, 77. 1 Ib. 238.

Bond creditor must obtain judgment before he can redeem.

Before a bond creditor will be permitted to redeem a mortgage, he will be required to procure a judgment at law on his bond, for till then no lien will have been created on the land. Thus, in *Bateman v. Bateman*, Pr. Ch. 198, where a person bound himself and his heirs in a bond, and died, leaving real estate to descend to his heir subject to a mortgage for years, Lord Keeper Wright held, that the bond creditor could not redeem a mortgage for years, without first having a judgment at law against the heir; although, his Lordship added, it might have been otherwise in the case of a mortgage in fee. The difference, however, is not very perceptible, for a judgment will create a lien on an equity of redemption, whether it be on a mortgage in fee or a mortgage for years.—It is also observable, that a judgment creditor has a right to redeem. The Lord Chancellor, in *Sharp v. Scarborough*, 4 Ves. 538, where there was a mortgage, then a judgment, and after that a second mortgage, said, the judgment creditor might redeem the first mortgage in preference to the second mortgagee; and this is now an established rule in equity. Vide *Burdon v. Kennedy*, 3 Atk. 739. *King v. Marissal*, Ibid. 192. *Churchill v. Grone*, Nels. Ch. Rep. 89. 1 Ch. Ca. 35.

Judgment creditor may redeem.

When the estate is in mortgage prior to a judgment, or if the legal estate be in any manner out of the debtor when the judgment is obtained, so that the creditor could not recover under an *elegit*, a court of equity, in order to protect a purchaser, will not permit the creditor to redeem. *Barret v. Blake*, 2 Ball. & Bea. 357.

that the assignee, in taking the account before the Master, should be confined to surcharge, and falsify only, and the interest upon the mortgage be computed at 5 *per cent.* although at that period money bore a higher rate of interest.

A mortgage by a popish heir may be redeemed by the next protestant heir (g) (F).

Protestant heir of papist may redeem.

(g) *Jones v. Meredith et al.* Bunb. 346. S. C. Com. Rep. 661.

(F) Thus if A. mortgage his estate to B. and die, leaving one son and three daughters, and afterwards the son dies, leaving the estate to descend to his sisters, who being educated in the Roman Catholic religion, continue to profess the same. Their aunt being the next protestant kin, will be entitled to the redemption of the premises, and after redemption she will be entitled to hold the same for her own benefit. *Jones v. Meredith*, ubi supra. But the laws against papists, as we have previously remarked, are now considerably mitigated, see ante, 106, in notis. By the statutes 18 Geo. 3. c. 60. 31 Geo. 3. c. 32, and 43 Geo. 3. c. 30. (chronologically explained in Mr. Butler's n. (2). s. iii. to Co. Lit. 391 a.) Roman Catholics are permitted, on taking the oath and declaration prescribed by these acts (the substance of which is expressed in p. 107, ante, in notis) to hold and enjoy lands descending from their ancestors, or which they may or shall have acquired by purchase. The consequence is, that a popish heir, taking the necessary qualifications, may now redeem the estate in exclusion of the next protestant heir; and in the case of the three co-heiresses being Roman Catholics, as in *Jones v. Meredith*, it is presumed, that if one of them should qualify herself to hold estates, she might redeem the whole mortgage, and enjoy the premises in exclusion of her aunt and sisters. The only case that has occurred on these statutes, or rather the first of them, is that of *Bunting v. Williamson*, 18th December, 1783, stated in Jacob's Law Dict. tit. Papist, s. II.

Roman catholic may redeem, when.

The stat. 31 Geo. 3. c. 32, which is the principal act, does not extend to Scotland; but by the 33 Geo. 3. c. 44. Roman Catholics of that part of Great Britain, who shall take an oath similar to that prescribed by the 31st of his late Majesty, before the sheriff depute, or two justices of the peace for the county where they reside, may hold, enjoy, alien, &c. real or personal property, as any other person or persons whatsoever, any thing in the act of the 8th and 9th session of the first parliament of Scotland of King William, or any other act or acts notwithstanding.

Scotch catholics.

In Ireland an oath of allegiance and declaration was framed for papists by the statutes 13 & 14 Geo. 3. c. 35, and by the 21 & 22 of the same reign, c. 24. Roman Catholics taking this oath, and subscribing the declaration, are qualified to purchase or take by grant, limitation, descent, or devise, any lands, tenements, or hereditaments in Ireland, or any interest therein, (except advowsons and manors, or boroughs returning members of parliament), and to dispose of the same by will or otherwise; and such lands, &c. so purchased or taken are to be descendible according to the course of the common law,

Irish catholics.

Customary heir may redeem, as youngest son in borough-english;

An equity of redemption will follow the custom as to the legal estate (*h*). In borough-english lands, if mortgaged, the equity of redemption will descend to the youngest son, to whom the lands descend.

(*h*) *Fancett v. Lother*, 2 Ves. 304.

and devisable and transferrable in like manner as the lands of protestants; and this act is confirmed by the 33 Geo. 3. c. 21.—Consequently papists, whether in England, Scotland, or Ireland, submitting to the requisitions of the above mentioned acts, may now both take estates in mortgage, and redeem the hypothecation of such as devolve on them either by descent or purchase.

Mortgage on faith of disabling statutes, not afterwards to be set aside.

But it is observable, that the statutes thus relaxing the old penal and disabling laws against popery are not to be construed so as to defeat a *bond fide* purchase previously made on the faith of those laws. A case of this description recently occupied the attention of the Court of Chancery in Ireland. By a statute of Anne, (2 Anne, c. 6. Irish statutes,) it is enacted, that in case the eldest son of a papist, possessed of real property, shall conform to the protestant religion, this act of conformity shall reduce the father to the condition of a tenant for life, and give the estate to the conforming son, subject to provisions for younger children. In the case in question (*Moore v. Butler*, 2 Sch. & Lef. 253), the defendant James Butler renounced the religion of his fathers, and embraced the protestant faith. A certificate of the bishop of the diocese in which he resided was produced, evidencing his abjuration of the "errors and corruptions of the Church of Rome," and his reception into the communion of the Church of Ireland. On the credit of this certificate the plaintiff Stephen Moore advanced to the defendant several sums of money, and took a mortgage of certain estates (the defendant's father being then living) for securing the re-payment of the money lent. The Lord Chancellor being of opinion, that, notwithstanding the bishop's certificate, evidence might be given to shew that James Butler was still a papist, sufficient proof was read to establish that fact, particularly that he had immediately before his death been attended by a popish clergyman, and had joined in the religious rites of that church. On this ground it was sought to deprive the plaintiff of his mortgage money; for that the mortgagor, when he made the mortgage, was not in a capacity to charge the estates, being then a catholic, and never having radically renounced the errors of that religion. The Lord Chancellor (Redesdale) observed, that the mortgage under which the plaintiff claimed was taken on the faith of the law as it then stood, and without express words he could not suppose the legislature meant by the subsequent acts to defeat a *bond fide* purchase previously made; and it seemed to him impossible to say that any acts subsequently done should tend to invalidate the title of Moore under his mortgage. The decree consequently was, that the title of the mortgagee was good.—For further on this statute of Anne, see *Cockburne v. Hussey*, 4 Ridgw. P. C. 510. *Aylmer v. Bellew*, Vern. & Scriv. 15. *Nugent v. Nugent*, How. Poph. Ca. 292. *Jones v. Inman*, Irish T. R. 433.

So, in mortgages of gavelkind (i) lands, which descend to all the children (ii) equally, the equity of redemption descends to all likewise (G). or all the children in gavelkind.

Where a mortgage is made under a power, with a proviso to be void on payment of the mortgage money, it seems to leave the equity of redemption in the same condition in which the estate subject to the mortgage was previous thereto; that is, under the like circumstances, so as that the equity of redemption will correspond with the title before the mortgage (H).

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Mortgage under power, redemption belongs to person for time being entitled to estate.

(i) *Fawcett v. Lowther*, 2 Ves. 304.

(ii) [Sons.—Ed.]

(G) If borough-english or gavelkind lands are mortgaged to persons not resident within the customs, the local laws will take place, and the youngest son of the mortgagee, if the former—and all his sons, if the latter, will be proper parties to the re-conveyance of the estate to the mortgagor on his redemption of the same. As to the descent of borough-english lands, see *Godfrey v. Bullock*, 1 Roll. Abr. 623, pl. 3. *Baker v. Bayley*, 2 Vern. 226. *Clements v. Scudmore*, 1 P. Wms. 63. 1 Salk. 243. 6 Mod. 120. *Chester v. Chester*, 3 P. Wms. 63. 2 Com. Dig. 153. 7 Vin. Abr. 560, and as to the descent of gavelkind lands, see 2 Bac. Abr. 637. 14 Vin. 14. *Preston v. Jervis*, 1 Vern. 325. *Clements v. Scudmore*, ubi supra. 4 Com. Dig. 304, and generally, Rob. Gav. p. 90.

Borough-english and gavelkind lands.

An infant heir, as distinguished from an infant purchaser of lands, subject to the custom of gavelkind, may alien absolutely by feoffment at the age of fifteen years; but it was the opinion of a very eminent conveyancer in a recent case, (after referring to the doubt in *Robinson*, p. 217,) that a gavelkind tenant by descent could not mortgage until twenty-one, or dispose of his lands while under that age for any other purpose than on an absolute sale for valuable consideration. Customs in derogation of the common law are to be construed strictly. Thence it should follow that a conditional sale could not be made where the custom only authorizes an absolute one. This doubt is in some measure confirmed by the late case of *Richardson v. Capes*, 4 Dow. & Ry. 512, where the custom was, that the tenants should grind their corn at one of two mills situate within the manor. One mill being out of repair, it was held that the custom was lost for ever; for customs being regarded as exceptions to the general rule, they are to be construed rigidly, and here the custom was, that the tenants should have the option of resorting to either mill, which option being destroyed, the correlative advantage could not be supported. This merely shews how strictly and even unfavorably special customs are viewed.

(H) To illustrate this paragraph by an example:—If A. be tenant for life, with remainder to B. for life, with remainder to C. in tail, with remainders over, with power for the tenants for life when in possession, to raise portions for younger children by way of mortgage or otherwise; and a mortgage be made by the first tenant for life, the equity of redemption will belong to A. for the period of his life, then to B. for his life, then to C. in tail, with re-

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Illustration of text.

Devisee entitled to redeem in preference to heir (K).

And it may be devised (k) (I). Thus, where one, seised in fee-simple, mortgaged his lands, with a proviso for re-payment by him, his heirs or assigns, and then devised the same premises, the court decreed, on a bill by the devisee to redeem, that the equity of redemption belonged to him and not to the heir (L).

(k) *Philips v. Hele*, 1 Ch. Rep. 190. Et vide 2 Burr. 978. [S. P. ante, 111 and 252.—Ed.]

Mortgage is an execution of power pro tanto only.

mainders over. But it is observable, that these rights to redeem do not accrue successively, that is, only in the order in which the respective tenants take the estate; for C. may redeem during A.'s life-time, and compel him to contribute his proportion towards paying off the incumbrance. Vide infra, 311. The mortgage under the power will operate as an execution of the power *pro tanto* only, whether the appointment be in fee or for years (*Thorne v. Thorne*, 1 Vern. 141, cited ante, 110, and see *Perkins v. Walker*, 1 Vern. 97, n.) unless there be an apparent indication of intention on the face of the instrument of an ulterior settlement of the estate, inconsistent with a future exercise of the power (*Fitzgerald v. Fauconberg*, Fitzg. 207. 217); and in corroboration of this paragraph in the text, (for which no authority is cited) it has been expressly held, that the right of redemption will remain in the persons who are entitled to the estate in default of appointment. *Innes v. Jackson*, 16 Ves. 356. 1 Bligh, 104. See more as to powers, ante, 59 and 61, in *notis*, and infra, 1031, 2.

Devise of equity of redemption must be attested by three witnesses.

Personal representatives and heir apparent may redeem.

(I) By a will attended with the like forms and ceremonies, as the law requires in reference to a devise of the land.

(K) And a judgment creditor in preference to the devisee. *Mole v. Franklin*, Finch, 51. So personal representatives may redeem, *Vincent v. Sharp*, administratrix, 2 Stark. 507, and see infra, 283, n. (P), also ante, 252, note (G), 253. *Stonehewer v. Thompson*, 2 Atk. 240. In this latter case, the personal representative of a judgment creditor was allowed to redeem in preference to an assignee of the bankrupt mortgagor. If a mortgagor has been absent thirty years, his heir apparent may redeem; for it may be presumed, when the mortgagor has not been heard of so long, that he is dead. *Frederick v. Aynscombe*, 2 Eq. Ca. Abr. 594. MS. notes.

Devisee may foreclose.

Lord Mansfield's observations in Martin v. Moulin, and Wren v. Buckley, considered.

(L) So reciprocally the right to foreclose will belong to the devisee of the mortgagee, although the mortgagee may have bequeathed the money only, and left the estate to descend to his heir or executor. According to Lord Mansfield (ante, 144, note (X),) a bequest of the money will carry the estate in the land along with it to every purpose, the estate in the land being the same thing as the money due upon it, and passing by a will not executed with the solemnities required by the statute of Frauds. These observations, if taken in their literal sense, admit of considerable qualification. Lord Mansfield indeed appears to have entertained mistaken conceptions on this and other subjects connected with the law of mortgages. His chief error seems to have been in mixing rules of equity with rules of law, and applying the former in cases where the latter only ought to have prevailed. In *Wren v.*

It was said in the case of *Turner v. Gwinn* (l), that a tenant in tail of an equity of redemption may devise it for the payment of debts. But this, it is apprehended, is not law now (m).

Tenant in tail of equity of redemption may devise it for payment of debts. Semb.

(l) 1 Vern. 41. 99.

344. 1 P. Wms. 9. *Robinson v.*

(m) Vide *Bowater v. Elly*, 2 Vern. Cuming, Ca. Temp. Talb. 164.

Buckeley, Doug. 292, his Lordship held, that a tenant for life having a power annexed to his estate, and conveying away his whole life-interest by way of mortgage did not thereby destroy the power, as it would be contrary to the intention of all the parties to hold that the power was extinguished; thus obviously considering the mortgage to be even at law a mere security for the debt, and not an actual conveyance. So shortly afterwards in *Eaton v. Jacques*, 2 Doug. 455, Lord Mansfield held, that a mortgagee to whom a term had been assigned, could not be sued as assignee of all the interest of the mortgagor before he took possession. But this view of a mortgage in a court of law is clearly erroneous, and hath since been exploded by the universal concurrence of the judges; for which see ante, 179, note (I), and *Vincent v. Ennys*, 3 Vin. Abr. 433, pl. 10, where Lord King held, that a power to a tenant for life to grant leases was destroyed by a mortgage made by him and a tenant for life in remainder, under the same settlement. As to the broad expressions of his Lordship in the case firstly quoted, that the devise of the debt due on mortgage will carry the estate along with it to the devisee, and that, by a will executed by two witnesses only, it is presumed that the doctrine meant to be inculcated was, that the bequest of the money carried the estate with it to every substantial purpose, and that thereby the estate in the land would be under the controul of the person to whom the debt was bequeathed, or as that excellent Judge, the late Master of the Rolls expressed it in the case of *Silberkildt v. Schiott*, 3 Ves. & Bea. 49. "A gift of the money will undoubtedly carry all the interest of the mortgagee in the land to the devisee, whatever that interest may be." But even this is an equitable principle, and can in no shape be applied so as to render the concurrence of the heir at law, or executor of the mortgagee, on a redemption of the premises, unnecessary. This subject as to the devise of a mortgage by the mortgagee will be further enlarged on in a subsequent note (post, 427), to which the reader is referred.

Bequest of money will carry mortgagee's interest in land.

Since writing the above, the editor has alighted on the following confirmatory observations of Lord Redesdale, respecting the confused application of equitable and legal principles, which appears to pervade many of Lord Mansfield's decisions. The observations of the Irish Chancellor are these:—"Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them, which subsists with us, is not known; and there are many things in his decisions which shew that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution, that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the adminis-

General character of Lord Mansfield's decisions.

Law and equity should be kept distinct.

At the time when the last case occurred, it was held that the intail of a trust was not within the statute *de donis*, and that a fine or recovery was not necessary to bar it, but that it was alienable by any other conveyance; but it hath since been decided that the same forms are necessary to bar the intail of a trust as of a legal estate (M).

Equity of redemption not devisable be-

It is said, that if a mortgagor, before the condition broken, devise it, the devise will be void; for a condition is not de-

tration of justice: and although they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different; and any body who sees what passes in a court of justice in Scotland will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts of equity; that it was the duty of a good judge *ampliare jurisdictionem*. This, I think, is rather a narrow view of the subject; it is looking at particular cases rather than at the general principles of administering justice; observing small inconveniences and overlooking great ones." *Shannon v. Bradstreet*, 1 Sch. & Lef. 66. Et vide similar observations by the present Chancellor (Lord Eldon) in *Wilson Ex parte*, 2 Ves. & Bea. 252. S. C. 1 Rose, B. C. 444, except that Lord Eldon said he was led to doubt whether Lord Mansfield was not sometimes applying as the doctrine of the court of equity what never had been so.

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Before tenant in tail can devise equity of redemption, he must suffer recovery.

(M) *Kirkham v. Smith*, Amb. 518. *Legatt v. Sewell*, 2 Vern. 532, and consequently the tenant in tail before he can devise the equity of redemption, or exert any other act of absolute ownership over the estate, must suffer an equitable recovery, which, on the authority of a late case, may be suffered without the concurrence of the mortgagee, *Nouaille v. Greenwood*, 1 Turn. 28; but in that case the recovery will be an equitable, and not a legal recovery. The effect however will be the same. An equitable as well as a legal recovery operates to confirm, and let in all preceding estates, charges, and incumbrances executed by the tenant in tail previously to the suffering such recovery, except the preceding estate or incumbrance be in favor of a volunteer and at the same time against a subsequent *bonâ fide* purchaser for valuable consideration, even with notice; in that case the recovery will operate to revoke the estate of the volunteer *pro tanto*, instead of confirming it. *Cornick v. Trepaud*, 6 Dow. P. C. 60. With reference to a devise for payment of debts which is somewhat in the nature of a charge or incumbrance, the recovery whether legal or equitable, will revoke the disposition by will in toto (ante, 113); and therefore it is truly said, that a tenant in tail cannot effectually devise the equity of redemption for payment of debts, or otherwise before recovery suffered; but he may after the recovery shall have been perfected and he shall have taken back the fee simple of the estate.

visable (n): But the cases of *Moor et al. v. Hawkins* (o), and *Roe v. Jones* (p), which seem to have, on solid grounds, established the power of testamentary disposition of possibilities accompanied with an interest, and of such as would be descendible to the heir of the object of them, dying before the contingent event on which the vesting or acquisition of the estate depends, appear to be equally applicable in principle to the case of a condition upon a mortgage (N).

(n) 2 Cha. Ca. 8.

33." The case is also reported in

(o) Cited Bla. Rep. Ch. 33, 4. [The

2 Eden, 3.—Ed.]

correct reference is "cited 1 H. Bl.

(p) Ibid. 30. [Et vide *S. P. Jones*

v. Roe, 3 T. R. 88.—Ed.]

(N) There is an obscurity in this passage. The learned author is treating of the persons who may claim the equity of redemption. The paragraph commences by stating, that if a mortgagor, before condition broken, devise it [the equity of redemption], the devise will be void. It is clear the author meant the devise of an equity of redemption; for his index, *see* Redemption, repeats this reading. Now a mortgagor before condition broken has not any equity of redemption to devise, nor has he, it is submitted, while the condition is in *terrorem*, any estate, as distinguished from a mere tenancy, either at law or in equity,—clearly not at law; for by the mortgage deed (presuming the mortgage to be in fee) he has conveyed away all his estate, right, title, interest, &c. both at law and in equity to the mortgagee; on a condition, it is true, but that a condition, the performance or breach of which a court of equity cannot notice, except as it leads to consequences injurious to one or both of the parties;—nor in equity; for a court of equity does not interfere till after the breach of the condition; that is, till after an equitable case has arisen. Before condition broken the transaction is reviewable in a court of law only, there being nothing previous to that period which calls for the interference of a court of equity. When default has been made in payment, and the estate is become absolute in the mortgagee, who immediately on such defalcation may bring an ejectment at law, and evict the mortgagor from his estate for half perhaps of its actual value, then it is that equity interposes and views the real nature of the transaction, giving it a new turn and consideration much to the advantage of the mortgagor. "After the day is past, a court of law will give no remedy; consequently no man can take the estate out of the mortgagee without the aid of equity." Per *M. R. Jones v. Smith*, 3 Ves. 377. But prior to the performance or breach of the condition, it is apprehended equity has nothing on which to ground its interposition, the mortgagor executing a lawful deed, and entering into a plain agreement to retain nothing more than the occupation or visible possession of the land, which is all that he can be said to possess, as distinguished from a right of entry on performance of the condition, and consequently all that he can devise (as far as such a right is devisable) prior to the arrival of the day appointed for payment of the money; and it should be observed that a right

Of the interest of mortgagor and mortgagee before condition broken.

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Heir not a necessary party to bill to redeem by devisee.

Every devisee of a mortgaged estate (*q*), that brings a bill to redeem, need not make the heir at law a party; if the devisee

(*q*) *Lewis v. Nangle*, 2 Ves. 431. sary parties to a bill of redemption.—
[Et vide post, 402, 3, for the neces- Ed.]

of entry is not assignable or devisable at law, though it seems the benefit to be derived by the entry of the heir may be devised or assigned in equity. 3 Pres. Abs. 355.

Position in Bacon's Abridgment questioned.

Bacon, however, in his Abridgment (tit. Mortgage (C), vol. iii. p. 635, 4th edit.) has advanced a position, which, if law, is in direct opposition to these observations. The mortgagor, he observes, "before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited or not, hath the legal estate in him, also after forfeiture he hath an equity of redemption," &c. This, it is presumed, is true only in reference to the reversion expectant on a mortgage by demise, the legal estate of which reversion may strictly be said to be in the mortgagor. But when the mortgage is in fee, or for a term of years, either with a proviso for cesser of the estate on payment of the money, or with an agreement for the re-conveyance or re-assignment of the premises, in either event, it is apprehended, that at the present day there can be little doubt but that the whole legal estate in the one case, and a partial legal estate for the term in the other, becomes vested in the mortgagee before forfeiture, and whilst it remains uncertain whether the condition will be performed or not, otherwise the mortgagee will not have any estate, and consequently not any security during the pendency of the condition; for if he has not the legal estate, he certainly cannot have an equitable one so as to leave a mere empty and useless legal title in the mortgagor; and if he has the legal estate (as all the law writers on this subject uniformly allow), then it cannot be in the mortgagor, since there cannot be two legal estates at the same time: and if the mortgagor has the legal title, why provide in the mortgage proviso for a re-conveyance or a cesser of the estate of the mortgagee, when, in fact, if the position in Bacon's Abridgment be received, he will not have any estate to re-convey or annul? All that the mortgagor can be said to have before forfeiture (beyond a mere tenancy) is a right of re-entry, and after forfeiture, a right to redeem. We may therefore conclude that the passage in Bacon's Abridgment is clearly a mistake; and that the legal estate instantly vests in the mortgagee on the execution of the deed, subject to be defeated on performance of the condition by the mortgagor. It may seem incongruous at first sight to say, that the mortgagor has a right of re-entry when he is already in possession. It is however to be remembered that the right of entry is as owner, whereas he is in possession as tenant.

Author's argument from comparison of condition with possibilities considered.

Correcting then the leading proposition of the text, by substituting in its place the following amendment: "If a mortgagor before condition broken devise it [*the estate*], the devise will be void:" it is worth considering how far this revision will be invalidated by the subsequent observations of the learned author. The reason given in support of the position is, that a condition is not devisable. But the author in effect detaches all the learning respecting con-

claims to have the will established, it is necessary: if only a title under the will, it is not.

ditions from the case of a mortgage, and treats the legal right of redemption, which resides in the mortgagor, before forfeiture, in the nature of a possibility coupled with an interest. This, perhaps, he might have been led to do from the case of *Marks v. Marks*, 1 Eq. Ca. Abr. 106. (S. C. 1 Stra. 129. 10 Mod. 419. Pr. Ch. 486) where it was held, that the possibility of performing a condition was an *interest* or right, or *scintilla juris*, which vested in the person to whom it was reserved; and as a possibility coupled with an interest might be devised (for the establishment of which, see, in addition to the references in the text, *Goodtitle v. Wood*, Willes Rep. 213. *Roe v. Griffiths*, 1 Black. 605. *Goodright v. Forrester*, 8 East, 567. *Doe v. Tomkinson*, 2 Maule & Selw. 165. *Scawen v. Blunt*, 7 Ves. 300. *Attorney-General v. Vigor*, 8 Ves. 256. *Perry v. Phillips*, 17 Ves. 173. 182. 1 Madd. Ch. 549, 2d edit. Et ante, p. 17, note (a),) so the learned author might have been induced to conclude that the possibility of the mortgagor's paying the money at the time agreed on, and his consequent right then to repossess himself of the estate, was such a possibility accompanied with an interest, descendible to heirs, as that it might be devised before condition broken. This conclusion may perhaps in the end (at least in equity) be correct, as we shall hereafter attempt to shew; but the premises which led the author to it do not exhibit that facility of application to the case of a condition on mortgage, which in the termination of the paragraph in question, he supposes them to furnish. The cases of *Moor v. Hawkins*, *Roe v. Jones*, and others of that class (though they concur in establishing the principle deduced from them in the text, arose on circumstances very dissimilar from the instance of a condition on a mortgage.

In the instance of a mortgage condition, it is easy to find a possibility, but it is difficult to ascertain the interest to which that possibility is to be annexed; for there is a considerable difference between a *right* or *scintilla juris*, and an *interest*. To illustrate these remarks by examples:—If A. have an estate which is to determine on a certain day, provided B., his heirs, executors, or administrators, on that day pays him a specified sum, then A. before the arrival of that day may be said to have an estate subject to a condition, over which he has not any controul. He has a vested interest in the lands, liable nevertheless to be divested on the happening of an event. On the other hand, if B. be to have an estate which is now in another person, on payment by him his executors or administrators, to that other person of a stated sum on a certain day, then he will have in his own hands a species of pre-emption or right of purchasing the estates above others at a stipulated and reduced price, which is widely different from the possibilities in the cases alluded to. B. cannot be said to have an estate on condition, not even on a condition precedent. He has not any interest in the lands till the day arrives and the payment is made (2 Pres. Abs. 186); he has indeed a possibility (if a thing under his own controul can be said to be in the nature of a legal possibility) of acquiring the estate; but he has not any interest in the lands to which that possibility may be annexed: and a possibility will not descend to heirs, unless it have that character of a fee-simple stamped on it by the author of the

Possibility of mortgagor's performing condition not an interest.

Bond or judgment creditor cannot redeem leasehold estate till execution sued.

A judgment creditor may redeem against a mortgagee of a leasehold estate (*r*), who is likewise a bond creditor: but,

(*r*) *Shirley v. Watts*, 3 Atk. Rep. in the latter end of note (K), ante, 200. *Angel v. Draper*, 1 Vern. 399. p. 257.—Ed.]
Et vide infra, 610, and cases cited

benefit. This latter instance is precisely the case of the mortgagor. He has not any interest in the lands to which the possibility of his performing the condition may be annexed, except indeed the mere possessory tenancy, which is generally conferred on him by the last clause in the mortgage deed, or by the tacit understanding of the parties. But this (if an interest), is far inferior in point of quality to the correspondent possibility which relates to an estate of inheritance; and there ought necessarily to exist a close similarity or rather connexion between the possibility and interest, which are said to be coupled together in such a bond of union. The phrase too "a possibility accompanied with an interest," though a common expression, is yet exceptionable, and not, strictly speaking, correct; for if the possibility be accompanied with an interest, it ceases to be a possibility, it is a contingent interest.

Mortgagor before condition broken can neither alien nor devise estate at law.

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Doctrine of conditions,

With one of the leading features of a condition in view, namely, that it is not devisable, the author has struck on an argument which not only tends to subvert that well-established maxim, but also to overturn, in a great measure the whole theory of conditions. His argument, however, does not exactly bear him out. The doctrine of conditions is highly essential to a clear understanding of this part of the subject. A short digression therefore, in this place, will not, it is hoped, be deemed irrelevant.—A primary distinction necessary to be remembered, is that which subsists between persons entitled to the benefit of a condition, and persons who have an estate subject to a condition. The former is the case with the mortgagor; the latter is the case with the mortgagee. As to the persons entitled to the benefit of a condition, it is a rule at common law (Litt. s. 347. Co. Litt. 214. b. Shep. Touch. 116. 146), that a condition cannot be reserved to a stranger; in other words, that no one except the person by whom the conveyance or mortgage is made, or his representative, viz. his heirs, as to real estate—or his executors, as to chattels real, can take advantage of a condition. The person entitled to the benefit of a condition to defeat the fee, has no devisable interest. 2 Pres. Abs. 186. The benefit of the mortgage condition consists in the right which resides in the mortgagor to restore the estate to himself and family, by payment of the money at the day. If at the time and place appointed for performance of the condition, the mortgagor be there ready to make a legal tender of his money, and no person be there to receive it, or it be refused, the condition will be satisfied, and the mortgagor or his heir might re-enter. Herein consists the benefit of the condition; but this right of re-entry being at common law neither alienable nor devisable, and reservable only to the mortgagor and his heirs (Dyer, 181. Co. Lit. 209 b.) an assignee or devisee could not re-enter, although he might make the tender. Hence, therefore, we may safely con-

before the bill is brought to redeem, a *writ of execution* must be sued out; for until that be done, the judgment cre-

clude, that a mortgagor cannot before condition broken, devise or transfer his legal right of redemption to another; for it is a pure condition, and not merely in the nature of a possibility accompanied with an interest.

'But we should here distinguish between a *condition* for redemption, and an *agreement* for redemption. The former occurs where the estate of the mortgagee is to cease on a given day, if the money borrowed be then paid. This is a proper condition, and neither assignable nor devisable. The latter arises where the mortgagee in the given event is to re-convey, &c. This is not properly a condition (2 Pres. Conv. 204), but a covenant in the nature of a condition (Litt. s. 328. Co. Litt. 203 b), which also cannot be taken advantage of by any other person than the mortgagor or his representatives. See *Nurstie v. Hall*, 1 Vent. 10. Litt. s. 203 b. 214 a & b. 2 Thomas's Co. Litt. 5. n. (B). *Stokes v. Russell*, 3 T. R. 678; and preamble of statute 32 Hen. 8. c. 34. If the executors of the mortgagor were to tender the money, and pay off the mortgage at the day appointed, the effect of such a payment would be, in the case of a proper condition to re-vest the estate in the heir of the mortgagor, and in the case of a covenant or agreement to re-convey, it would entitle the heir to call for a re-conveyance. And it would be the same if the money were paid by a stranger, as an assignee or devisee of the mortgagor. Co. Litt. 207 a. Litt. s. 337. The statute 32 Hen. 8. c. 34, which allows assignees of reversions to which conditions are annexed, to take advantage of these conditions, does not extend to assignees of the reversion expectant on a mortgage for years; for the condition, which is framed for ceasing the term, respects the payment of a sum in gross, and not of rent, or other thing of *the like nature*. Co. Litt. 215 b. The form of the agreement of redemption, which provides for a re-conveyance, runs thus, "If the mortgagor, his heirs, executors, or administrators, shall pay, &c. to the mortgagee a specified sum on a certain day, then the mortgagee shall re-convey or re-assign the lands mortgaged to the mortgagor, his heirs and assigns, or to such person or persons as he or they shall direct or appoint." Here the word "assigns," if the previous observations be well founded, is mere surplusage; for there cannot be any assignee of the covenant or condition in its executory state. But the mortgagor may, it is conceived, in effect alien or devise the estate during that period, by making an appointment in favor of the alienee or devisee, for whom he and his heirs would, in case the condition were performed at the day, be a trustee in equity; for though at law the mortgagor has only a right of re-entry till condition broken, yet in equity he is considered as having the entire ownership of the estate, and the mortgage is considered but as a mere pledge.

applied to provisions for redemption.

Mortgagor may bind himself and his heirs in equity.

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But it proves to be a fact, on examination of the report, that the fundamental proposition of the text is mis-stated. Instead of its being an instance where the mortgagor devises before condition broken, it is the case of a mortgagee exercising that act of ownership over the premises before that period. The rule to be collected from the report (*Anon.* 2 Ch. Ca. 8), is, that "If a mortgagee devise lands before condition broken, it will be void, because a

Mortgagee cannot devise before condition broken.

ditor hath no *lien* on the leasehold estate) and, for want

This rule examined.

condition is not devisable." It remains to be considered, whether the rule, as thus propounded, is law at the present day? This depends greatly on the solution of a previous question, namely, whether the mortgagee may assign the mortgage before condition broken, for if he may assign, then, it is conceived, he may devise his defeasible estate. The word "assigns" is a comprehensive term, a *nomen collectivum*, including not only a devisee (*Freak v. Lee*, 2 Show. 38. *Machel v. Dunton*, 2 Leon. 33. *Bristow v. Bristow*, Godb. 161. *How v. Whitfield*, 1 Vent. 358, 9. S. C. Sir T. Jones, 110. 2 Show. 57,) but an executor and administrator also (*Booth's case*, 5 Co. 77 b. *Tilney v. Norris*, 1 Ld. Raym. 553. S. C. Carth. 516. Salk. 309, pl. 13.) The form of proviso usually inserted in the mortgage deed favors the supposition that a mortgagee might transfer all his interest in the premises to another, before the day arrives on which the money is made payable. The form alluded to runs thus:—"If the mortgagor, his heirs, &c. shall pay, &c. on a certain day, the money borrowed, then the mortgagee, his heirs or assigns, shall re-convey the lands mortgaged." The word "assigns" here evidently presupposes a power in the mortgagee to convey away the estate to another. There are many passages in Co. Litt. to the same purport. In particular, there is a case of *Randall v. Brown*, reported in fol. 210 a, before the Chief Justices in the Court of Wards, where it was resolved, that if a man make a feoffment in fee, on condition that if the feoffor pay to the feoffee, his heirs or assigns, 20l. before such a feast, *the feoffee hath an estate in the land which he may assign over*, but his executors cannot be his assignees, because "assigns" in the condition was only intended to refer to assignees of the estate; and in the same folio it is added, "But if the condition be to pay the money to the feoffee, his heirs or assigns, and *the feoffee make a feoffment over*, it is in the election of the feoffor to pay the money to the first feoffee, or to the second feoffee; and so if the first feoffee dieth, the feoffor may either pay the money to the heir of the first feoffee, or to the second feoffee; for the law will not enforce the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectual or not, but at his pleasure;" et vide *Goodall's case*, Co. Litt. 207 b. Litt. s. 336, and commentary. Hence it is inferred, that the mortgagee in fee may, before the day appointed for payment of the money, assign over his mortgage; et vide *Gladman v. Henckman*, infra, 976. A modern writer of the greatest eminence passes over the point, in an instance which he gives on the very subject, without considering it as dubious, or worthy of any particular observation. The passage alluded to is to the following effect:—"If A. convey to B. in fee by way of mortgage, and before condition broken A. and B. join in the transfer of the mortgage to C. the effect of a condition introduced into this transfer, will, if the condition operate, be to restore the estate to B. the former mortgagee, instead of re-vesting it in A. the person in whom it is intended that the estate should vest when the mortgage debt is discharged. See 2 Pres. Conv. 201. And in a subsequent work the same learned writer observes, that "persons who have an estate subject to a condition [which is the exact situation of a mortgagee while the contract is executory] may convey, &c. [by which &c. is to be un-

And now considered as exploded.

of its being taken out, the bill in the principal case was dismissed (s) (o).

(s) *King v. Marissal*, cited in the principal case, [and reported 3 Atk. 192.—Ed.]

derstood, that tenants on condition may devise, alien, and exert every act of ownership over the estate, subject to be defeated by performance of the condition], for they have the same seisin or ownership as other owners, subject only to the condition which gives a collateral quality to their estate, and renders the same defeasible." 2 Pres. Abs. 185. We may therefore, on these authorities, consider the position that invalidates the alienation or devise by the mortgagee of the lands mortgaged before condition broken, as untenable.

In conclusion it may not be improper to recapitulate the rules contended for in this note; the first is, that a mortgagor, before condition broken, cannot at law alien or devise the estate; but in equity he may bind himself and his heirs, so that on tender of the money by the alienee or devisee, and acceptance of the same by the mortgagee, his executors, administrators, or assigns, the mortgagee and his heirs would be obliged to do every necessary act for completing the title of the alienee; and as to the devisee, the heir it is presumed would be a trustee for him. The second rule is, that the mortgagee may at law before condition broken assign over the whole of his estate and interest in the lands mortgaged to a third person, who would thereby be enabled to recover the debt and costs in his own name; but a power of attorney to sue in the name of the original mortgagee should, in an assignment of this kind, be seldom omitted. See further, 684.

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Statement of
points adduced
in this note.

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(O) This subject, and that of judgments in general, requires a more particular explanation, which, without much interruption, may be introduced in this place:—During the prevalence of the feudal system, in this kingdom, a creditor could only obtain, in all actions of debt, judgment for satisfaction against the goods and chattels of his debtor and the growing crops and profits of his land; but he could neither obtain the possession of, nor any estate in the land itself. The feudal system prohibited alienation, and of a consequence the incumbering a fief with debts; so that an adjudication, whereby the creditor would have become entitled to the possession of his debtor's landed estate, would have wrought a circumvention of the existing laws; for thereby the lord would have had a tenant forced upon him, probably against his will and certainly without his concurrence. When the restrictions on alienation were taken away, this consequence still continued; no creditor could take possession of his debtor's land, but only of his goods and chattels by *feri facias*, and of the product of his freehold estate by *levari facias*, and even of these latter he might have been deprived by a subsequent alienation of the land itself. To remedy this inconvenience, it was enacted by the stat. Westm. 2. 13 Edw. 1. c. 18. that when a debt was recovered or acknowledged (*recognitum*), or damages adjudged in the king's courts, it should be in the election of the creditor either to have a writ of *feri facias*, or else that the sheriff should deliver to

Origin of judgments and elegits.

Tenants by elegit, levam facias, &c. may redeem.

Tenant by *elegit*, statute-merchant, or staple, may redeem (t).

(t) *Jones v. Meredith*, Bunb. 347. also in Pr. in Ch. 226, is meant by this 2 Eq. Ca. Abr. 594, notes. [If *Cason* latter reference, the case is not in *v. Round*, which is in the text of point. It was decided entirely on Equity Cases Abridged, and reported another ground.—Ed.]

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him all the chattels of the debtor, saving only his oxen and beasts of the plough; and also one half of his lands until the debt was levied upon a reasonable price or extent. In pursuance of this statute a new writ was framed, called an *elegit*, from the words of the entry on the roll, *quod elegit sibi executionem fieri de omnibus catallis et medietatem terre*. Thus a judgment in an action of debt, obtained in any of the courts of record at Westminster, became a lien on freehold estates, as it enabled the person in whose favor it was pronounced to obtain possession of one half of the debtor's lands and tenements. And observe, the statute says, "when a debt shall be acknowledged." A judgment, therefore, entered up in pursuance of a warrant of attorney, given by a debtor to certain attorneys, of the court to confess a judgment against him, will equally enable the creditor to sue out an *elegit* as a judgment obtained in an adversary suit. And Lord Kenyon, in *Doe v. Carter*, 1 T. R. 61. said, he saw no difference between a judgment obtained in consequence of an action resisted, and a judgment signed under a warrant of attorney; since the latter was merely to shorten the process, and lessen the expence of the proceedings. A judgment is a general lien on a moiety of the lands of the debtor, not only on those which he has at the time of entering up the judgment, but also on those which he may subsequently acquire. *Moleyn's case*, 30 E. 3. 24 a. 1 Roll. Abr. 892, pl. 14 and 16. 2 Ib. 472. 2 Inst. 395.

Judgment, a lien on land, not to be defeated.

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It is a lien because the lands are liable to the execution of the creditor whenever he pleases to sue out writs for that purpose. By an *elegit* he may extend a moiety of the freehold lands, and by a *fiery facias* he may take the whole of the leasehold property of his debtor. 8 Co. 171. The *elegit* itself (when sued out) does not immediately touch the lands; for if the chattels are sufficient to pay the debt, and it appears so to the sheriff, he ought not to extend the land: so at least it was argued in the case of *King v. Baden*, Show. P. C. 74. See as to the *Elegit*, post, 599, et seq. The judgment is a general lien, and not a specific lien, *Finch v. Winchelsea*, 1 P. Wms. 279. 9 Mod. 395; that is, it is not a lien on any particular estate or part of estate of the debtor, but extends to a moiety of all his lands generally. And it is highly important to bear in mind that this lien affects the legal estate, and cannot be defeated or defeated by any species of alienation whatsoever, not even if it be to a mortgagee or purchaser without notice, 2 P. Wms. 492. *Forth v. Duke of Norfolk*, 4 Madd. Rep. 505, (said to be appealed from, Sug. V. & P. 459), except it be a mere empty legal estate, the trust of which is possessed by another, and then indeed it seems that judgments against the *cestui qui trust* will bind the lands in the hands of the trustee, provided the legal estate continues in the trustee at the time of execution awarded. But if he join the *cestui que trust* in conveying to a purchaser (even with notice of the judgment) in the interval between the docketing of the judgment and the issuing of the *elegit* to the sheriff, the

[And in analogy to the case of a redemption by a tenant under

judgment creditor will be defeated of his lien. See *infra*, as to attendant terms, and post, 607. The relation of trustee and *cestui que trust* must however, to effect this, be created before the docketing of the judgment; for otherwise the conveyance of the trustee will be subject to the lien of the duly docketed judgment, which nothing we have seen can affect or defeat. Consequently, if there be first a judgment and then a mortgage, with or without notice, the judgment creditor may sue out execution, and extend a moiety of the lands in the hands of the mortgagee. Hence the imperative necessity, of searching for judgments previously to the completion of the mortgage.

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If however there be a satisfied or even an unsatisfied term, or legal estate, outstanding in any person (the creation of which being prior to the time when the lien of the judgment attached on the land) the purchaser or mortgagee may, by procuring an assignment or conveyance of such term or legal estate, protect himself from the judgment, provided he has not *at the time of his mortgage or purchase* any notice, either actual or implied, of such judgment. *Willoughby v. Willoughby*, post, 465. S. C. 1 T. R. 763. *Maundrell v. Maundrell*, 10 Ves. 270. And it is observable, that if the purchaser or mortgagee have not any such notice previously to the time of completing his contract, an assignment or conveyance of the term or legal estate at any subsequent period, even if it be with *express notice* of the judgment, will have the effect of overreaching the lien of the judgment creditor, and of protecting the mortgagee or purchaser in the same manner, as if the conveyance or assignment of the term or legal estate had been made at the time the treaty for the loan or purchase was concluded. Whenever therefore an assignment or conveyance of a term or legal estate of any antiquity can be procured, a search for judgments will be superseded. A search indeed, in that instance, should be carefully avoided, if it be intended to rely on the term or legal estate for protection; for by a search before the money paid or conveyance or mortgage executed (post, 553, 4), the party will acquire notice, and then the conveyance or assignment will not be of any avail, except as against any other dormant incumbrance. A search, however, should not be omitted unless the purchaser or mortgagee is entirely satisfied that neither express nor implied notice can be proved against him, his solicitor, agents, or those whom he has employed in the transaction of the business. This would be risking too much; for notice may be inferred from very slender circumstances; and therefore a purchaser or mortgagee can rarely be advised to dispense with the usual searches for judgments, even if he has acquired a prior term or legal estate. The expence of searching for judgments is usually borne by the purchaser; the mortgagee will of course be exempted from the payment of such charges. It is scarcely necessary to add, that if the term be recently created, judgments prior to the creation of the term will be hostile incumbrances, and should consequently be inquired after. Whatever judgments are found should be required to be satisfied, and if necessary, assigned (a form of which assignment will be found in the Third Volume with observations thereon). And when a purchaser or mortgagee has searched for judgments,

Except by prior term or legal estate.

Judgments, when to be searched for.

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Terms when to be assigned.

a husbandry lease, a tenant by the old writ of *levari facias* may also be admitted to redeem.—*Ed.*]

**[OF
JUDGMENTS.**

*Abstract should
state judgments
and search be
made just be-
fore completion
of contracts.*

and none are either found, or those which are found are satisfied, yet he cannot be advised to permit the term or legal estate to remain outstanding; for, besides the protection which it affords on the one hand against all latent charges, it may on the other be obtained by a subsequent incumbrancer, who would thereby acquire a priority.

On the subject of searching for judgments, it may be useful to add a case before Lord Kenyon, at Nisi Prius, where his Lordship said, that an abstract ought to mention every incumbrance whatever affecting the estate upon which any security is about to be placed; and should, therefore, contain an account of every judgment by which the estate is affected. That the abstract, therefore, in the case before him, was objectionable in that respect; nor was the difficulty removed by the offer to have satisfaction acknowledged under a power of attorney, as that was liable to objection; and it had been decided by Lord Hardwicke, that a party was not bound to accept of any conveyance or any agreement executed under such circumstance. That, with respect to the searching for judgments, the conduct of the plaintiff's attorney had been perfectly proper; for as it was *absolutely necessary to search for judgments immediately before the conveyances were executed, lest some judgments should have been entered up during the treaty*, he had assigned a very proper reason for not having done so at first, namely, the plaintiff's assertion that no judgment did in fact subsist charging the estate, except one for 1000*l.* before mentioned, and it saved the expence of a double search for judgments. Accordingly, his Lordship ruled that the plaintiff, having discovered another judgment for 5000*l.* besides that for 1000*l.* above mentioned, and thereupon declined to proceed in advancing his money, was entitled to recover the expences of the conveyance with interest, from the time the plaintiff had prepared it to the time that the treaty was at an end. *Richards v. Barton*, 1 Esp. 268.

The search is generally extended for a period of ten years back, and if a judgment be found, then for a further period of ten years preceding its date.

*Search for
judgments un-
necessary, when
conveyance
taken from as-
signees of bank-
rupt.*

The statute, for the better division of the estate of bankrupts (21 Jac. 1. c. 19. s. 9.), provides that all creditors by judgment, whereof execution is not served and executed before the bankruptcy, shall only come in rateably with the other creditors. Consequently a search for judgments against the bankrupt will be unnecessary when the estate is derived through his assignees. In a late case on this statute a person articted to sell his estate, but became bankrupt before the conveyance; the assignees (to whom a bargain and sale of all the bankrupt's real estate had been duly made and enrolled) sought for a specific performance of the contract entered into between the bankrupt and purchaser. The latter objected that certain creditors of the bankrupt by judgment duly docketed and registered, were unsatisfied before and at the time of the bankruptcy; and that therefore their judgments were liens on the premises. Sir W. Grant however was of opinion, that the judgments were inoperative against a title derived from assignees

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under a bankruptcy, and over-ruled the exception, but without costs. *Sharpe v. Rhoads*, 2 Rose, 192. See also *Sloper v. Fish*, 2 Ves. & Bea. 145. *Newland v. ———*, 1 P. Wms. 92, and *Orlebar v. Fletcher*, Ibid. 737.

If judgments can be defeated by means of powers.

If an estate be conveyed to A. to such uses as B. shall appoint, and in default of appointment to B. in fee. A judgment creditor against B. may take in execution the lands so limited while they continue in the possession of B. But a question arises, whether, if before execution sued, B. appoints to C., the lands can be attached in the hands of C. for the judgment of B. Till appointment the use is executed in B. and he being seised, the lien attaches as against him; then the lien having once attached can it afterwards be defeated by the debtor's own act? If B. suffers the lien to attach, must it not be considered, at least in equity, as a partial or rather perhaps virtual exercise of the power in favor of the judgment creditor? If C. had notice of the judgment at the time the power was exercised in his favor, it would be extremely difficult to contend that the lien of the judgment was over-reached by the appointment of the debtor. Moreover B. having the power and the estate also, it is probable a court of law would consider that the power was absorbed in the fee, if an execution of the power were set up to prevent a purpose of justice. If the conveyance had been to A., to such uses as B. should appoint and in default of appointment to C. in fee, it is clear that at law a judgment against B. would not attach on the estate, and in equity it is not a settled rule that a person having such a general power of appointment shall be considered as owner of the estate. It was indeed in one case held "that where there is a general power given or reserved to a person for such uses intents and purposes as he shall appoint, by will or otherwise, this makes it his absolute estate and gives him such a dominion over it as will subject it to pay his debts." *Banton v. Ward*, 2 Atk. 172. The good sense and justice of such a rule is very obvious, but it does not appear to have been followed, 12 Ves. 216. The power is viewed as vesting no estate or interest in the appointor independently of his will; and therefore if he make no appointment the creditors cannot claim, and the court will not compel him to appoint. If however he does appoint, his creditors will then be entitled in preference to his legatees or appointees. *Holmes v. Coghill*, 7 Ves. 449. 12 Ib. 206. *Townsend v. Windham*, 2 Ves. 1. *Thompson v. Towne*, 2 Vern. 319. 416. But a bankrupt having a general power of appointment over an estate, cannot prevent the just demands of his creditors by refusing to execute the power. The present bankrupt acts confer express power on the assignees to execute all powers in the bankrupt, but it was previously hinted by the Vice Chancellor, that if such power were not exercisable by the assignees the whole policy of the bankrupt acts might have been evaded. *Cook v. Bridgwater*, MS. 7th December, 1824. B.'s wife would clearly not be entitled to dower either at law or in equity, 5 Madd. 310; and the right of a judgment creditor to attach the lands in the hands of the appointee by the assistance of a court of equity (if indeed a court of equity would assist him, of which there are strong doubts as against a *bonâ fide* purchaser without notice) such right cannot be said to assume the character of a lien but only of a bare equity. If in default of appointment the use had been limited to B. in fee instead of to C. in fee, then it is apprehended that a judgment creditor may be considered as having a lien on the estate at law so long as it continues in the hands of B., and an equitable lien on the estate in the hands of a

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purchaser and appointee from B. who has notice of the judgment; clearly if the *habendum* had been to B. and his heirs, to such uses as B. shall appoint, and in default of appointment to B. in fee. In which case also there is strong ground to contend that the judgment creditor would have a lien at law on the estate in the hands of a purchaser with or without notice; for that the power is simply void and the fee executed in B. from the date of the conveyance. The case of *Moreton v. Lees* noticed by Mr. Sugden, (Pow. p. 133. 3d edit.) is at variance with this proposition so far as any analogy can be perceived to exist between that case and the one in contemplation. There the conveyance was to a purchaser and his heirs, to such uses as the purchaser should appoint, in default of appointment to the purchaser in fee. The purchaser exercised the power, and his wife was held barred of dower. This decision was denied to be law by Mr. Preston, argo 5 Madd. 318, and it certainly is in defiance of all principle, and in direct opposition to the generally received opinion of the profession. In *Ray v. Pong*, the conveyance was to A. and his heirs, to such uses as B. should appoint, and in default of appointment to B. in fee. B. exercised the power, and his widow was held barred of dower, 5 Madd. 310. 5 Barn. & Ald. 560. With so few guides to anticipate what will be the ultimate judgment of the court in these cases, it is impossible to offer any thing but conjecture on the subject, and as such the foregoing observations are submitted.

Bargain and
sale.

In *Flower v. Baldwin*, Cro. Car. 217, it was held that a bargain and sale when enrolled within the six months relates to the sealing of the deed so as to avoid incumbrances to strangers. But it is added, "*sed quære* if it shall avoid a judgment suffered by the bargainor before it is enrolled." This *quære* is a gratuitous observation by the reporter. It does not appear in the body of the case, and it was distinctly agreed by all the court (in conformity with a prior decision in *Mullery v. Jennings*, 2 Inst. 674,) that all *metne* incumbrancers are avoided by the enrolment. Cro. Car. 218.

As to time when
lien of judgment
attaches on
land.

We may, in the next place, with propriety, advert to the time when the lien of a judgment is considered as attaching on lands. An investigation of this point will be peculiarly essential to the mortgagee, because the lands will be bound in his hands from the time the lien of the judgment fastens on the equity of the mortgagor; and on foreclosure the mortgagee must make such judgment creditors who have liens, defendants, in order that they might have an opportunity of redeeming the estate if they (according to priority) shall be so inclined.—(See, as to this, post, 964, 5.)—The whole of a law term, for many purposes, is taken in intendment but as one day, and a judgment of the court given on the last day of the term is considered as relating back to, and its lien and operation as commencing from the first day of the term. 1 Serjt. Wils. Rep. 37. 4 Co. 71 a. Cov. Rec. 20. 88. Consequently, if a purchase or mortgage were completed at the beginning of a term, and a judgment in fact given many days after, yet by relation back to the first day of the term, the judgment would acquire priority, and subject the lands to an extent, although the *bona fide* purchaser had neither notice nor any possible means of obtaining notice. This hardship on an honest purchaser was remedied by the statute of frauds and perjuries, 29 Car. 2. c. 3. s. 14 & 15, which enacted, that the judge or officer signing the judgment should set down the day of

And the law is the same as to a judgment creditor, though the judgment be with stay of execution (α). Thus, where *H.*, *S. L. though judgment be with stay of execution.*

(α) *Stonehewer v. Thompson*, 2 Atk. 440. [S. C. in *notis*, infra, 282, nomine *Elvys v. Thompson*.—Ed.]

the month and year of his so doing upon the paper book, docket, or record, which he should sign, which date should be also entered on the margin of the roll of the record where the judgment was entered; and that purchasers, &c. should be charged from such time only, and not from the first day of the term whereof the judgment was entered. And in a late case, where leave was given to enter up judgment as of a preceding term *nunc pro tunc*, the court of King's Bench, in order that it might not affect purchasers and mortgagees, ordered it to be docketed of the term in which the application was made. *Baker v. Baker*, 2 Tidd. Pr. 967, 6th ed. By subsequent statutes 4 & 5 W. & M. c. 20. cited at large, post, 513, and made perpetual by 7 & 8 W. 3. c. 36. judgments are required to be docketed, viz. those of Michaelmas and Hilary Terms, before the last day of the ensuing terms; and those of Easter and Trinity Terms, before the last day of Michaelmas Term. And it is declared that no judgment not so docketed shall affect purchasers or mortgagees. Et vide *Forshall v. Coles*, 7 Vin. Abr. 54. App. to Sug. V. & P. 41. Et vide 513, in *notis*. From the time of docketing therefore the legal lien of the judgment attaches; and if the judgment has been docketed, then, whether the subsequent purchaser or mortgagee have actual notice of the judgment or not, he will be bound by it; and although we shall hereafter have occasion to remark that the docketing of a judgment is neither implied nor express notice to a purchaser or mortgagee, yet that observation must be qualified by remembering that a prior docketed judgment will have all the effect of the docket being deemed notice in equity; the contrary doctrine, that the docket is not notice being principally applicable to the case where the mortgagee files a bill to foreclose, as then he will not be obliged to make those judgment creditors parties to the suit of whose incumbrances he has not notice by other means than by the docket.

It is also observable, that by the registry acts, 5 Anne, c. 18. 6 Anne, c. 35. 7 Anne, c. 20. 8 Geo. 2. c. 6. it is provided that no judgment, statute, or recognizance (other than such as shall be entered into the name and upon the proper account of his majesty) shall affect or bind any manors, lands, tenements, or hereditaments, in the counties of Middlesex and York, unless a memorandum of such judgment, statute, or recognizance, shall be entered at the register office in manner therein directed. In Middlesex, judgments bind from the time they are memorialized. In the North Riding of York, any judgment registered within twenty days; and in the East and West Ridings of the same county, as also in Kingston upon Hull, any judgment registered within thirty days after the day of acknowledgment will be available in like manner as if registered on the day it was acknowledged. If, therefore, the lands purchased or mortgaged lie in a register county, the register must be searched for judgments and incumbrances, as well as the dockets of the courts at Westminster, since a judgment, though docketed, will not, as to lands,

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At law, from time of docketing;

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or, in a register county, from time of registration;

in 1693, confessed a judgment, with a defeasance, by which it was not to take effect until after the death of a woman, who

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*or, as to persons
on whom notice
can be proved,
from time of no-
tice in equity.*

in that province, become as against a purchaser without notice, a legal lien which he will be bound to observe, unless it be also registered as well as docketed. See further as to registration, post, 616.

The statute of William & Mary was enacted, as the preamble recites, for the purpose of giving to purchasers, mortgagees, and other persons therein named, greater facility in discovering judgments affecting the lands which they had taken in mortgage, purchase, &c. The statute did not make indexing or docketing notice to all the world of the existence of the judgments so registered, but merely required the incumbrances to be recorded, in order that the persons named in the statute may be assisted in ascertaining the liens which affected their estates. When then a purchaser or mortgagee had actual notice of an undocketed judgment, it was in one case in effect held (*Davis v. Strathmore*, 16 Ves. 419), that the purchaser or mortgagee being thereby made acquainted with the incumbrance, the statute which required the creditor to index his judgment did not apply; because the mortgagee was already in possession of what the legislature intended to furnish him with: and it was expressly decided (over-ruling *Forshall v. Coles*, ubi supra. Et vide *Le Neve v. Le Neve*, 4 Bro. P. C. 405), that a purchaser will be bound by notice of a judgment, though it be not docketed.

*Same law in
Thomas v.
Pledwell.*

In *Thomas v. Pledwell*, 7 Vin. Abr. 53, a similar interpretation of the statute seems to have been given by Lord Macclesfield, as far as it can be gleaned from the short report of the case in Viner. In that case there appears to have been first a judgment; then a sale in 1718; then a docketing of the judgment three years afterwards. But it was in evidence that the purchaser had notice of the judgment before he completed his purchase, and retained part of the purchase money as an indemnity against the same. The judgment creditor filed a bill for satisfaction of his debt, which the purchaser resisted, on the ground that the judgment was not docketed according to the requisitions of the statute. Lord Macclesfield said, it was plain the defendant had notice of the judgment, and did not pay the value of the estate; that was a strong presumption of an agreement to pay off the judgment; and since the plaintiff could not proceed at law against the defendant upon the judgment for want of docketing in due time, he ought to be relieved in a court of equity; and the purchaser was accordingly decreed to pay the money *bonâ fide* due on the judgment. There are two circumstances in this case on which the relief prayed for might have been granted. The first, that the purchaser clearly acknowledged the judgment, and virtually agreed to discharge the same by retaining part of the purchase-money for that purpose; the second, that the purchaser had notice of the judgment, and was therefore bound by it, though not docketed. Leaving the second circumstance out of the question, and viewing the case on the first point only, it is presumed that the contract between the vendor and vendee could not have given the judgment a more effective lien on the land than it had previously to such an agreement; and before that agreement it was not any lien at law for want of a compliance with the statute. It may therefore be contended, that the case was decided on the

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*That case and
Davis v.
Strathmore re-
conciled.*

lived until 1726. The estate, subject to this judgment, de-

second circumstance entirely. But it is matter of little consequence now since the recent adjudication above alluded to has settled the point, either over-ruling or confirming this determination of Lord Macclesfield. The expression of the rule, as qualified by these cases, is, that the lien of the judgment attaches on land from the time it is docketed, or supposing it not docketed, then it attaches as against all persons on whom notice thereof can be proved and their assigns, (*Anon.* 2 Vent. 361, No. 2.) from the time such notice is given.

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An eminent modern writer, on the same point, has expressed himself thus, "Judgments are charges by way of lien in equity, from the time at which they are recorded; and at law, from the time at which they are docketed;" and from that time, or which last happens, from the time of ownership in the defendant the lien attaches." 1 Pres. Abs. 191. A distinction is here taken between the lien of judgments at law and the lien of judgments in equity; but unless judges at law shall expound the statute of Wm. & M. in a manner quite different from what judges in equity have determined to be the spirit and meaning of the act, no such distinction exists. The question has not occupied the attention of the common law courts since the decision in *Davis v. Strathmore*, ubi supra; and therefore the statement of a settled distinction between the legal and equitable lien of judgments, as to the time at which such lien respectively attaches on the land, is at least premature. The probabilities are, that on a judicial investigation of the subject, such a distinction will be established [so ruled, infra, *Doe v. Alsop*.] The observations of Lord Kenyon and the determinations next alluded to, shew that courts of law are strongly inclined to adhere to the letter of the act, which consequently will occasion a difference between the lien of judgments at law and the lien of judgments in equity. But it is observable, that these decisions were made prior to the case of *Davis v. Strathmore*, ubi supra; and there seems some difficulty in supposing that the common law judges (who are equally to attend to the reason and spirit as well as the terms of acts of parliament) should, in the face of an adjudication, which has determined that notice of the judgment, though not docketed, shall bind the purchaser or mortgagee, adopt a different interpretation of the statute, and decide, that although notice of the judgment can be proved on the mortgagee or purchaser, yet since the judgment is not docketed, there shall not be any lien on the land. Mr. Justice Buller in one case observed (after stating the rule in equity as to the possession of title deeds), "if this has become a rule of property in a court of equity, it ought to be adopted in a court of law." *Goodtitle v. Morgan*, 1 T. R. 762. Now, though no one can deprecate the introduction of equitable doctrines into courts of law more than the writer of these notes, yet he submits that in the interpretation of an act of parliament there ought not to be one construction of its provisions in a court of equity; another in a court of law; and a third perhaps elsewhere. It must not however be forgotten that notice is an equitable doctrine, and that there are many questions between purchasers in regard to notice whereon

Distinction between legal and equitable lien of judgments considered.

scended from *H.* to his heir, who mortgaged it to *T.* The

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courts of law cannot, or rather ought not to decide without adopting the rules of equity, which Lord Eldon considers may be attended with many pernicious consequences. See *Evans v. Bicknell*, 6 Ves. 184, 185.

But though notice is peculiarly, it is not exclusively, an equitable doctrine. See *Woolley v. Clarke*, 5 Barn. & Ald. 747, where regard was had to the priority of knowledge between parties claiming under two instruments equally lawful in point of form. And Lord Talbot has remarked, that a court of equity will not differ from a court of law in the exposition of statutes. Ca. temp. Talb. 39; but see what is said of that observation, *infra*, 279 a.

Whether courts of law will interpret the stat. of Wm. & Mary in same manner as courts of equity [now settled they will not, inf. 279 a.]

The question may come before the common law court in this case:—Suppose a judgment to be entered up, then a treaty for a loan engaged in, and notice of the judgment to be given to the intended mortgagee before he has paid over his money to the borrower, and after the execution of the mortgage the judgment to be docketed in due time, or not in due time, and an *elegit* to be sued out thereupon, and the judgment creditor to bring an ejectment to obtain actual possession of the lands. Here the court must decide whether the ejectment can be maintained. This would depend on the exposition which the statute received. If it were held, that the object of the act was obtained by notice to the mortgagee (and there is nothing in the act to contradict that interpretation), then the case would be left as it stood before the statute; and we have already seen that then the judgment creditor would prevail. But if on the contrary it were held, (as the received doctrine at law at the present day seems to be), that the undocketed or unduly docketed judgment shall not affect the mortgagee, then the judgment creditor could not recover; and notice would not at law work the same effect as it hath been decided to do in equity. The ground which induced a court of equity to decide that a lien on the land was created by notice of the judgment, was, that if the purchaser or mortgagee, after being warned of the incumbrance, neglected to get it satisfied and even completed his contract, with a knowledge of its existence, this was such a palpable instance of the *crassa negligentia* that equity would not give him any priority to the judgment creditor, but would permit the creditor to have satisfaction out of the lands after the contract was carried into execution and the money paid to the borrower. This is not merely an equitable principle. A similar position was taken by Lord Kenyon, as the ground of his decision in *Hickett v. Hayter*, 6 T. R. 386, if, says his Lordship, the plaintiff had regularly docketed his judgment, the defendant, by using due diligence, would have known that there was such a judgment signed; but as the plaintiff did not pursue the directions of the act, the defendant could not by searching in the proper office have learnt that the judgment was properly signed. This argument might have been carried on thus:—since, however, the plaintiff has given the defendant actual notice of his judgment, the defendant is in possession of all the knowledge which he could have acquired by a search in the proper office; and therefore the omission to docket the judgment shall not in this case make any difference. And his Lordship afterwards did in effect annex something of this kind to his argument. In a subsequent place he adds:—If the defendant could have been proved to have had notice of this judgment

mortgagee had no notice of the judgment at the time: the

debt, *perhaps* the executrix would have been warranted in paying it before the bond debts; but in order to make the executrix liable, as for a *devastavit*, the judgment should have been docketed. "But," continued his Lordship, "*I doubt whether any other notice of the judgment than that required by the statute would have been sufficient for this purpose, it is best to abide by the words of the act of parliament.*"

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This last passage is certainly opposed to the supposition that courts of law would expound the statute under consideration, in the same manner as courts of equity; but Mr. Buller misquotes the expressions of Lord Kenyon, when he says, in *Steel v. Rorke*, 1 Bos. & Pul. 310, "I agree with Lord Kenyon that no notice is sufficient but that which the statute has required;" for Lord Kenyon was dubious on the point. In the two lastly cited cases it was clearly laid down that against those whom the statute of Wm. & M. meant to protect, the debt, on a judgment not docketed, would at law be reduced to a level with simple contract debts, and on this ground courts of law might perhaps feel an insuperable difficulty in following the decision in equity, namely, that the lien of a judgment not docketed within the time prescribed by the statute, shall, if notice be given of it to the purchaser or mortgagee, attach on lands as against them.

Lord Kenyon's
observations
against affirm-
ative supposi-
tion.

But the principal objection to the foregoing expression of the rule remains to be considered. It is remarked that judgments are charges by way of lien in equity from the time at which they are *recorded*, that is, from the time they are signed and entered on the paper roll or record, as mentioned in the 14th section of the statute of frauds already referred to. The learned author also makes the same general statement, post, 517, 18, where he conceives the case of *Robinson v. Harrington* to prove plainly that lands are affected from the time of judgment recovered, and not from the time of docketing. And it may be inferred from certain expressions which fell from the Lord Chief Justice of the Court of King's Bench, in the case of *Doe v. Hilder*, 2 Barn. & Ald. 785, that his Lordship is of the same opinion. In the course of the arguments in that case his Lordship asked, "How can notice to quit be necessary, when the judgment, which was signed in 1808, bound the land from that period; and if it would bind the purchaser in fee, why should it not equally bind a tenant for a term of years?" As to this it is observable, that it does not appear by the report whether the judgment was docketed or not, but it must have been docketed in due time, otherwise it could not have supported the decision of the court which was subsequently pronounced; and therefore, it is conceived, that Ld. C. J. Abbott, when he speaks of the judgment having bound the land in 1808 as against a purchaser in fee, must be understood to be speaking of a judgment which was regularly docketed, as distinguished from a judgment which was merely signed; for such a judgment, it has been clearly shewn, would not at law affect a purchaser, whatever lien it may create on the land as against the debtor himself. Substituting the word "docketed," then for the word "signed," in the latter quotations we pass on to remark, that as to the debtor himself, the lien of judgments would, both at law and in equity, certainly attach from the time at which they are recorded. But as to purchasers

Mr. Preston's,
the Author's,
[279]
and Ld. C. J.
Abbott's obser-
vations on this
subject, quoted
and qualified.

heir afterwards, in 1721, about five years before the woman

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Notice immaterial at law, if judgment undocketed. Latest case on this subject.

or mortgagees, it is submitted, that the lien of a mere recorded judgment does not attach in equity until notice of its existence has been communicated to such purchaser or mortgagee; for, if it did such a doctrine would operate to render nugatory the decision pronounced with so much anxiety by the Lord Chancellor in *Strathmore v. Davis*, previously alluded to, and to supersede the necessity of docketing judgments in conformity to the statute of Wm. & Mary; in a word, to overturn the present system of judgments, and render insecure the titles to numerous estates.

The question here discussed, whether a court of law will interpret the statute of William & Mary, in regard to notice, in the same manner as a court of equity, may be considered as settled by a late case, reported since the last edition of this work went to press. The case must be considered as deciding that actual notice at law will not bind the party with a judgment which has not been duly docketed. Lord Talbot has said, that a court of equity will not differ from a court of law in the exposition of statutes; Ca. temp. Talb. 39; but that rule must now be considered as obsolete, however consonant it may be to equity, justice, and reason. The case alluded to was this:—Two assignments of the same leasehold premises in the county of Middlesex were executed, the last in date registered first, but the second assignee had full knowledge when his deed was delivered, that a prior assignment had been made. For him it was contended that a subsequent purchaser for a good consideration, having registered his title first, was to be preferred before a prior purchaser; and that as to the knowledge of the prior conveyance, it would make no difference at law; all that it would do was, perhaps, to entitle the defendant to relief in equity. The Lord Chief Justice delivered his opinion in the following terms:—A court of law is now called upon, for the first time, to put a construction on the words of the statute 7 Anne, c. 20. s. 1, by which it is enacted, that every deed or conveyance that shall, after the 29th September, 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. It is impossible that plainer words could be used, and, I think, that, sitting in a court of law, we are bound to give effect to them; and that we cannot say that this deed is not fraudulent and void within the meaning of the act, because, possibly, it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shews clearly how inconvenient it would be, if this court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it is at least a fit matter for its consideration. We, however, in a court of law, must give effect to the words of the act.—Bayley, J.: I am of the same opinion. The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words “*bonâ fide purchaser*,”

died, became bankrupt; and the mortgagee was appointed

are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the Judges in the cases cited, although they thought that a court of equity would, in some cases, interfere to relieve the party. It is so laid down by Lord Hardwicke, in *Le Neve v. Le Neve*; and the words of Lord Mansfield, in *Doe v. Routledge*, Cowp. 712, are these, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have." He therefore puts it as a case in which equity would interfere; and the circumstances of this case shew the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice if we were to decide in favor of the defendant. And per Best, J.: The words of the statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me that the case of *Le Neve v. Le Neve*, in which Lord Hardwicke considers that the party under these circumstances as entitled to relief in equity, is an authority to shew, that at law he is without defence. Judgment was accordingly given for the second assignee. *Doe v. Alsop*, 5 Barn. & Ald. 142. As to the equitable consideration of the case, see *infra*, 624, n. (N), on the point of registry.

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JUDGMENTS,

The practical conclusions deducible from the preceding remarks are, *first*, that as against the debtor himself, the lien of judgments attaches both at law and in equity on all his lands, whether in fee simple, fee-tail, or for life, from the moment the judgment is signed or recorded, and without either docket or registration they continue to be liens against him and his property till aliened. *Second*, that in reference to judgments, which are merely signed or recorded; no lien at law attaches on the estate as against purchasers or mortgagees, but in equity, in consequence of the statute of Wm. & M. relating only to purchasers, mortgagees, and those who have to administer assets, and not to the debtor himself, undocketed judgments are considered as remaining in full force against the debtor and all who claim under him with notice of the judgments, since by notice such derivative claimants are in full possession of all that the statute intended to give them. In equity, therefore, the lien of judgments, merely signed or recorded, attaches on the estate against purchasers and mortgagees from the time actual or implied notice of such undocketed judgments can be proved upon them. *Third*, leaving the distinctions between legal and equitable lien, the moment the judgment is docketed it becomes at law a lien on the real property of the debtor, not only on that which he may then have but also on all estates which he may afterwards acquire, both as against himself and all other persons deriving title subsequently to such docket by or under him. *Fourth*, it is observable that the lien created by judgments is different as to personal estate from that which it creates as to real estate. As against terms for years and personal estates judgments do not create any specific lien. The property is bound only from the time at which execution is sued to the sheriff or other officer, and delivered to him for the purpose of being executed, 29 Car. 2. c. 3. s. 16. *Jeans v. Wilkins*, 1 Ves. 95; and as between different plaintiffs the sheriff must give priority to the writ of *fiery facias* first delivered

Four rules as to time when lien of judgment attaches to real and personal estate.

Representative
of judgment cre-

assignee. After her death, the representative of the judg-

OF
JUDGMENTS.

Mortgagee may
still be over-
reached by
judgment,
when.

to him, from which time we have seen the goods are bound. *Hutchinson v. Johnson*, ubi supra, p. 258, in notis.

Notwithstanding the attention displayed by the courts and legislature to prevent fraud and iniquitous dealing, in reference to judgments (and per Heath, J. 1 Bos. & Pul. 310, there cannot be a greater instrument of fraud than a judgment not docketed; for a party meaning to act honestly would follow the directions of the act), it seems that a purchaser or mortgagee may still be over-reached by a judgment signed prior to his purchase or mortgage, but entered up subsequently to it. It was decided by Lord Holt, in *Hodges v. Templer*, 5 Mod. 191, that "a judgment given in any term may, at any time afterwards, during the succeeding vacation, and before the essoin day of the next term, be entered on the roll as of the same term in which it was given." So that if the lands be mortgaged or sold in the vacation, and the judgment be entered up before the essoin day of the following term, it will affect the lands in the hands of the purchaser or mortgagee. And though this has been doubted by Mr. Tidd (*Tidd's Pract.* 857, 6th edit. 969. Et vide Bac. Abr. by Gwill. tit. *Execution* (I) n.), yet, says Mr. Sugden (*Vend. & Purch.* p. 587, 5th edit.), "it seems to be correct, as the judgment is not affected by the act of Car. 2. or that of Wm. & M. The judgment binds only according to the letter of the statute of Charles; and it is not required to be docketed by the act of Wm. & M. before the last day of the subsequent term. And there is no inconvenience in this rule; for the practice is to index judgments as soon as they are signed, in order to enable purchasers to search for them with facility. But this practice is wholly independent of the directions of the act by which judgments are required to be docketed." But see the case of *Lyttleton v. Cross*, 3 Barn. & Cress. 317, cited infra, 516. In addition to these remarks, it may be observed, that the statute of Wm. & M., which required judgments to be docketed, did not supersede the former practice of docketing the judgment on parchment or paper, which is still necessary to be done by the attorneys on entering and bringing in their rolls, but intended to add a further ceremony to that practice, by requiring the dockets to be entered in alphabetical order by the officers of the court. Before the making of this statute the judgment bound the lands from the time it was given, and the docket was nothing more than an index to find it readily. *Gilb. Prac. in C. B.* 165. But now it seems necessary that the judgment should at law be docketed, in order to bind the lands as to purchasers and mortgagees; and if it be not docketed (1 *Str.* 639, and see Barnes, 261, 2), or if there be a false docket, which is as none, though it be a right judgment (1 *Bac. Abr.* 103. *Gilb. Prac. in C. B.* 165), yet the purchaser or mortgagee if he has no notice may consider himself safe from all lien of the creditor, who must take his remedy over against the attorney or officer for not docketing the judgment truly. The object of the act was to enable purchasers and mortgagees to discover judgments by the names of the persons against whom they are entered; if therefore the name of a defendant be falsely entered, as *Compton* for *Crompton*, the judgment will be void against purchasers and mortgagees,

ment-creditor brought his bill against the assignee to redeem *creditor preferred to assignee of bankrupt.*

but not against the defendant himself. The court however will not amend the record. *Salt v. Crompton*, 1 Serjt. Wils. 61. 9 Stra. 1909.

OF
JUDGMENTS.

If a judgment be entered up after a contract for sale of the debtor's estate and actual payment of the purchase money, but previously to the execution of the conveyance, the purchaser will, it seems, supposing the purchase money to be an adequate consideration for the lands (1 P. Wms. 282), be relieved against the judgment in equity, *Finch v. The Earl of Winchelsea*, 1 P. Wms. 277. 10 Mod. 468. 2 Eq. Ca. Abr. 685; because, after the contract and payment of the money, the vendor will be only a trustee for the purchaser. *Sed vide* what is said to be the opinion of Mr. Serjt. Hill, in a case of this kind, post, 361, *in notis*. But a mortgagee for a valuable consideration and without notice shall take place of the intended purchaser; for in this case the money is lent upon the title and credit of the estate and attaches upon the land; but it is not so in the case of a judgment creditor, who (for aught that appears) might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien on the land. 1 P. Wms. 279.

Effect of judgment docketed after contract for purchase.

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If a mortgagee in fee purchase the equity of redemption, he will of course be protected from all judgments entered up subsequently to his mortgage, of which he had not notice either actual or constructive at the time of the treaty for such purchase; for by the contract he will acquire equal equity with the judgment creditor; and, having already the legal estate in mortgage, his title cannot be impeached. And it is observable, that for this purpose, neither the registration, nor the docketing of a judgment, will, of itself, constitute constructive notice to the mortgagee; those acts not being in themselves notice; for which see the latter end of the note to p. 568, and 606, post. It has been said, that notice of judgments entered up subsequently to the mortgage, will not affect a mortgagee who purchases the equity of redemption. But it is considered, that if he purchase with notice of any judgment either express or implied, the legal estate will not protect him in equity against the judgment creditor; for, although the judgment creditor cannot extend the equity of redemption, yet he having a lien on it in equity, he will be entitled to redeem; and if it could be proved that the mortgagee had notice of the judgment before his purchase was completed, the judgment creditor would be allowed to redeem after an absolute conveyance; for which see post, 381, 2, 3, and the note to p. 306, post etiam.

Mortgagee purchasing equity of redemption, how affected with judgments.

To come more immediately to the subject of this chapter, and to consider in what cases a creditor may redeem, it is observable that an equity of redemption cannot, in any case, except at the suit of the crown, be taken in execution. So, it was submitted in a former note, and that is considered to be the true rule at the present day. Ante, p. 257, n. (K). The consequence is, that a creditor has not at law any way whatever of obtaining the beneficial estate of his debtor (either freehold or leasehold) while that estate is in mortgage. The only course open to him is to redeem the first mortgage, and then as against all prior and subsequent incumbrances of which, at the time of such redemption, he shall have had no notice, he will be permitted to tack

Of redemption by a creditor.

the mortgage, upon payment of principal, interest, and costs. The question was, whether, as there was no actual *elegit* taken out by the judgment-creditor before the commission of bankruptcy issued, the assignee under the commission, *qua* such,

OF
JUDGMENTS.

What necessary to entitle him to redeem.

his judgment debt to the mortgage, post, 528; and the mortgagor, his heirs or assigns, will not be allowed to redeem the mortgage without paying the judgment also. Besides he may bring an ejectment if he has acquired the legal estate by the redemption, and take possession of the lands, or give notice to the tenants to pay the rents to him, out of which he may deduct his interest on both debts, and return the surplus to the mortgagor.

But to entitle a creditor to redeem, his debt must be such as creates a lien on the land. Whether this should be an equitable or legal lien, it may now be proper to inquire. In reference to a leasehold estate, we have seen (*ubi supra*, in the text) that this lien must be legal, that is, a writ of execution must be sued out and delivered into the hands of the sheriff for actual execution. The case of *Shirley v. Watts* (*ubi supra*, in the text) purports to require a writ of execution merely; but in *Burdon v. Kennedy*, 3 Atk. 739, Lord Hardwicke said, when a *fiery facias* is lodged in the sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time. *S. P. Jeanes v. Wilkins*, 1 Ves. 196. So in *Angell v. Draper*, post, 609, 610, it was required that a judgment creditor, before he be permitted to redeem a mortgage of a leasehold estate in equity, should sue out execution at law, and thus qualify himself with all the preliminaries necessary to create a legal lien. In analogy to this doctrine, it may be contended, with respect to freeholds, that although the lien in equity attaches as against a purchaser or mortgagee from the time notice of the judgment is given to them; and that from that period the estate will become bound by the judgment, yet that a court of equity would not permit the judgment creditor to redeem, until he has docketed his judgment, and made it a lien on the land at law. It is possible that a court of equity would adopt this argument, and require the creditor to docket his judgment before he should be permitted to redeem the estate, if the time provided by the statute were not elapsed; but if the creditor have omitted to docket his judgment, his lien at law will be gone according to the received opinion, and the judgment will become void against the purchaser or mortgagee; and, as the Master of the Rolls observed in *Foreshall v. Coles*, Sug. V. & P. Appendix, No. 19, the practice of the clerks docketing them after that time, is only an abuse for the sake of the fees, and *ineffectual to the party*. But in equity the judgment will, if notice thereof can be proved on the mortgagee or purchaser, bind the land, though not docketed in due time, and entitle the party to redeem. Consequently an equitable lien will be sufficient to entitle a creditor to redeem a mortgage of freehold property (*ante*, p. 262, n. as to the case of articles); but if a legal lien can be obtained, it is conceived it must be procured as a necessary preliminary to the redemption of the mortgage; at all events the creditor cannot be advised to neglect the due registration of his

or the judgment-creditor, should redeem? And it was contended, on the side of the assignee, that the heir was chargeable *only as terre-tenant*; and therefore the person *who* claimed under the judgment was *not* a creditor of *the bankrupt*. *Sed*

judgment, merely from the circumstance of his having given notice to the mortgagee or purchaser.

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On this head of law it merely remains to remark, that there are some few passages in the works of learned writers, which have a tendency to confuse the student; and without strict attention to the whole bearing of the subject, to inculcate wrong impressions. Thus, when it is said that a judgment creditor hath not any lien on a term for years till execution sued, as it is in many of the books, (see Chalm. on Lea. 142. 2 Pres. Abs. 2.) it is not to be thence inferred that a judgment creditor cannot redeem a mortgage for years of freehold property till he has lodged a writ of *fiери facias* with the sheriff; for the term, or leasehold estate, is not in the mortgagor but in the mortgagee, whose judgment will not in equity affect the property. *Finch v. Winchelsea*, 1 P. Wms. 278. In like manner many books use this language:—A judgment creditor may redeem, having previously sued out a writ of execution. See 2 Fonbl. Tr. of Eq. 269, and 1 Madd. Ch. 522, 2d edit. Now, with respect to a mortgage in fee and a mortgage for years of freehold property, no writ of execution is requisite to entitle a creditor to redeem. It is to the redemption of a leasehold estate only that a writ of *fiери facias* is essential. The rule therefore, as thus propounded, is too general.

Caution against
incorrect ex-
pressions of
rule.

A creditor having thus qualified himself to redeem, he must redeem the whole estate, or no part of it. Accordingly, Lord Hardwicke, in *Elwys v. Thompson*, 9 Mod. 396, decreed, that the plaintiff (a judgment creditor) ought, in the first place, to redeem the mortgage of Sir John Thompson (who, in addition to his character of mortgagee, was also the sole assignee of the mortgagor's heir, who had become bankrupt), and though there were other lands comprised in the mortgage, which the judgment did not affect, yet, as Sir John Thompson insisted upon his whole mortgage-money being paid him, the redemption could not be restrained and proportioned to the judgment lands, but should be whole and entire, extending to all the lands. When the estate came into the hands of the plaintiff, the equity would be of a different kind; for, although he could not charge his judgment upon the estate of the heir, yet he would be entitled to have all the estate of the ancestor liable to be applied to his judgment; and if there were any surplus, that, Lord Hardwicke said, should go towards satisfaction of the mortgage debt, the residue of which debt should be thrown upon the estate of the heir; and if there were any surplus after payment of the judgment and mortgage, that should be applied to Sir John Thompson, as such assignee of the bankrupt's heir at law, for the benefit of the creditors of the bankrupt; but the best way would be to have the estate sold; which his Lordship decreed. This case appears to be the same as that of *Stonehewer v. Thompson*, which is immediately mentioned in the text for supporting another point. See the same law, post, 339. 343; and *Palk v. Clinton*, 12 Vcs. 59.

Redemption
must be of en-
tire mortgage.

As to priority between judgment creditors, see post, 514, *in notis*.

Judgment a lien on land in hands of heir and assignee.

per curiam. The judgment-creditor is entitled to redeem the whole (for it must be entire), and to have the estate of *H.* exonerated out of that of his heir, if the heir's is sufficient. As to the point which had been laboured, in order to make this person come in as a creditor under the commission of bankruptcy, there was nothing in it. If it had been merely a bond-creditor from the ancestor, there might have been some colour to insist upon this under the statute of fraudulent devises; because that act made it a debt against the heir himself, as well as the ancestor. But it was entirely different here, as this was a *judgment* which was a *lien* upon the land, *a fortiori* a *lien* upon the lands in the hands of the assignee under the commission, who stood only in the place of the bankrupt (P).

Judgment creditor cannot redeem after bankruptcy of mortgagor.

(P) By the bankrupt laws a judgment creditor is not entitled to priority like a mortgagee, 21 Jac. 1. c. 19. s. 9. 13. The consequence of this position is, that a judgment creditor, after a commission has issued against the mortgagee, cannot, with benefit, redeem the mortgage, because he will not be allowed to annex his specialty debt to the mortgage. He may, however, tack his judgment to the mortgage against other creditors, if he has effected a redemption before the issuing of the commission. *Baker v. Harris*, 16 Ves. 397; and see as to tacking, post, Chap. XIII. p. 552, 3, *in notis*.

Executor may redeem.

Here it may be proper to remark, that an executor may redeem, but it seems under the following qualifications:—If A. mortgage a lease, or pledge a jewel or piece of plate, and before the day limited for redemption or payment, die, his executor will be entitled to redeem at the day and place appointed. If he redeem with the testator's money, such chattels will be assets. If he redeem with his own money, he will be entitled to be indemnified in respect to the sum he has disbursed out of the effects of the testator, or if necessary by the sale of the chattel itself, and in that case the surplus over and above such indemnity, will be assets. In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property will be altered by such payment, and will be vested in the executor, as a purchaser in his own right. But if the executor disburse his own money to redeem after the time specified for redemption is elapsed, then it is said that the chattel will, without any distinction in respect of its value at law, belong to the executor in his own right, since, in such case, it must be deemed to be sold to him by the mortgagee or pawnee, who, after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person. But in equity the excess in value of the thing beyond the money paid for the redemption, will be regarded as assets in the hands of the executor. See Went. Off. of Ex. 76, 77. 79. 81. 3 Bac. Abr. 58, 59, n. 2. Fonb. Trea. on Eq. 404, n. (f). Keilw. 63. Ante, 266, n. (K).

The crown may redeem estates mortgaged, forfeited by the mortgagor, by his being indicted and outlawed for high treason (x) (Q). Crown may redeem.

(x) *Attorney-General v. Crofts et al.* 1 Bro. P. C. 222.

(Q) In the case cited, Sir Roger Strickland was indicted and outlawed for high treason, and was, by inquisition taken thereon, found to be seised of the reversion in fee of certain lands expectant on a term of 1000 years, which was then vested in one A. B. On inspecting the deed of assignment to A. B. there appeared to have been a proviso for redemption inserted therein, and afterwards erased. The Attorney-General exhibited a bill, praying a discovery, whether this term was an absolute or only a mortgage term? and that the crown might redeem if any thing remained due to the said A. B. as mortgagee of the premises in question. At the hearing, it appeared in proof that the erasure had been made previously to the execution of the deed, whereby it became an absolute assignment as on a sale, and the bill was consequently dismissed, but the order of dismissal was afterwards reversed, on the ground that Sir Roger Strickland had continued in possession, and had exercised every act of ownership after the pretended sale was made, and the mortgagee was directed to account for the profit of the mortgaged premises from the time of the first judgment of *amoveas manus*. Absolute assignment, with proviso for redemption erased, adjudged a mortgage.

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In Sir *Salathiel Lovell's* case, Dom. Proc. 1 Salk. 85, (acknowledged by the Master of the Rolls, in *Burgess v. Wheate*, 1 Eden, 210, and cited ante, 253, one H. being seised of lands for three lives, was attainted for counterfeiting the king's coin, on the statute of the 8 & 9 W. 3. by a proviso of which statute corruption of blood is saved, and thence it became a question, whether H. had forfeited the lands, which the king, as a forfeiture, had granted to Baron Lovell. The Baron brought a bill in the Exchequer to redeem, and obtained a decree, against which an appeal was lodged in the House of Lords; and it was holden by the judges, that in case of an attainder for felony, the forfeiture of the estate to the lord was only by way of escheat *pro defectu tenentis*, and the not descending was the consequence and effect of the corruption of blood or incapacity, but in treason the lands came to the crown as an immediate forfeiture, and not as an escheat. And the forfeiture and corruption of blood were distinct parts of the penalty, so that the forfeiture might be saved, and yet the corruption remain, or the corruption might be saved, and the forfeiture remain. And accordingly it was so provided by several statutes, and by consequence that the lands were forfeited in the present case. Assignee of crown may redeem.

It is further observable, that although the crown might redeem the estate, yet the mortgagee cannot proceed to a peremptory foreclosure; for if he were to file a bill for that purpose against the Attorney-General on behalf of the crown, which is the usual course in such cases, the court would direct that he should hold and enjoy the mortgaged premises till the crown should think proper to redeem the estate. *Reeve v. Attorney-General*, 3 Atk. 223. Mortgagees must wait till crown thinks fit to redeem.

The crown may also be redeemed, if the estate by attainder of the mortgagee, vest in the king, for which see post, 306. Et vide for further, index, tit. *Extent*.

Guardian may
redeem.

If an estate descend to an infant, subject to incumbrances (y), the guardian may, without the direction of a court of equity, apply the profits to discharge the incumbrances, *viz.* to pay the interest of any real incumbrance, and the *principal* of a mortgage; because that is a *direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance (R).

(y) *Palmer v. Danby*, Pre. Ch. 137.

Observations on
rule in text.

(R) This latter limb of the rule is not very consistent with the reason assigned in support of the former; for there may be real incumbrances other than a mortgage, which are direct and immediate charges on the land; but these, according to the terms of the rule, cannot be redeemed or discharged by the guardian, because they are not mortgages, though in fact they come within the spirit and terms of the reason assigned for the redemption of the latter. It is therefore because they are not mortgages that these incumbrances cannot be redeemed, and it is because a mortgage is a mortgage that such an incumbrance may be discharged by the guardian, which is an argument futile and redundant. An annuity, with a proviso for redemption on certain terms, is a direct and immediate charge on the land, and there can be little doubt but that a guardian may perform such stipulations, as are mentioned in the proviso and redeem the annuity in the name, and for the benefit of the infant heir. In one case the Chancellor said (*Ware v. Polhill*, 11 Ves. 276), that it was in the power of a guardian properly appointed to redeem the land-tax on the infant's estate. This amounts to a clear admission that guardians have a power to discharge the principal of other real incumbrances, beside those by mortgage. The rule, perhaps, may be said to imply, that a guardian could not redeem the principal of any incumbrance which was merely a lien on the land, making these words a necessary addition to the text, "but not the principal of any other real incumbrance which is not a direct and immediate charge but only a lien on the land." With this amendment, however, the rule will not be quite correctly expressed; for, supposing the mortgagor in his life-time to have had a further sum advanced him, for which he gave a bond and judgment, this judgment the mortgagee may tack to his real security, and resist the payment of the mortgage without payment of the judgment also; and it must be admitted that the guardian redeeming the mortgage would be allowed and even compelled to discharge the judgment as well as the mortgage. For more on Guardians, see 2 Fonb. Tr. on Eq. 225. 250, 5th edit. *Frazer v. Marsh*, 2 Stark. 41. *Curtis v. Rippon*, 4 Madd. 462, and post, 396. 1005.

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Guardian may
redeem annuity
and land-tax,

as also judg-
ment tacked to
mortgage.

Committee of
idiot or lunatic
may redeem.

"If the heir be an idiot of what age soever, any man may make tender [of the mortgage money] for him [at the day appointed for performance of the condition] in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases." Co. Litt. 206 a. "So in like cases" will perhaps imply, that after the mortgage is forfeited, the committee of the idiot or lunatic may redeem; and if before such committee

A jointress may redeem, and although the jointure be secured only on part of the estate, yet she may redeem the

Jointress may redeem.

shall be appointed the mortgagee file a bill to foreclose, any person, it is presumed, might, out of charity, and to save the estate, redeem for the benefit of the *non compos*. In *Grimstone Ex parte*, Amb. 706. S. C. cited 4 Bro. C. C. 234, two mortgages were, by order of the Lord Chancellor Northington, paid off by the committees of the lunatic mortgagor, out of savings of the rents and profit of the estate, and the terms (the mortgages being for years) were assigned to attend the inheritance. "This order to pay off the mortgage," said Mr. Baron Smythe, who assisted the Lord Chancellor (Apsley) on a petition of rehearing, and who thought the next of kin entitled to the money in preference to the heir, in whose favor Lord Northington had decreed, by ordering the terms to attend the inheritance and the mortgages to become extinct. "This order to pay off the mortgage is not substantially wrong, for the recovery of the lunacy is never desperate; but it is wrong in the consequence deduced from it as to the successor; the lunatic not being recovered." 4 Bro. C. C. 235. But it is now settled that the heir and next of kin must take their respective properties, as fortune leaves them on the death of the lunatic. *Compton v. Oxendon*, 2 Ves. jun. 265. In *Phillips Ex parte*, 19 Ves. 123, Lord Eldon noticed a case, which he recognized but did not name; where a lunatic was seised of two estates, the one A. *ex parte paternâ*, the other B. *ex parte maternâ*, the latter subject to a mortgage. Timber cut on A. was applied in redemption of the mortgage on B.; and on a question between the different heirs, it was held, that the heir of the estate A. was not to be recompensed. It is therefore clear, in fact it has never been doubted, that a committee of a lunatic may, by order of the court, redeem the mortgage, and even without an order, if threatened with a foreclosure, it is conceived he might redeem the incumbrance out of the personal estate of the lunatic, which redemption would enure to the benefit of the heir at law of the *non compos*. But in all cases it would be more prudent to obtain an order, as otherwise the committee will redeem at the peril of a review.

Heir and next of kin of lunatic take estates as they find them.

Committee may redeem one estate out of produce of another.

Should always procure order to redeem.

But he cannot mortgage.

But although the committee of a lunatic may exonerate the estate of all charges subsisting upon it at the time it is delivered to his custody; yet he may not encumber the property by lease, mortgage, or otherwise, without a special order for that purpose. Where therefore a lunatic, before he became such, mortgaged part of his estate for 50*l.*, and the committee took up 400*l.* more upon the estate, Lord Keeper Guildford held, that the mortgage should stand as a security for the 50*l.* only. *Foster v. Merchant*, 1 Vern. 262.

The student will find an ample statement of the law of idiocy and lunacy, as far as it regards the equitable jurisdiction of the Chancellor, in 2 Madd. Ch. 723, 2d edit.

Trustees or executors for infants, who are not expressly authorized to invest on real securities, cannot lend trust monies on mortgage of lands, without an express order of the court; and the court will not make an order for that purpose, unless under very special circumstances, as where there is a mortgage or charge on the infant's estate. *Norbury v. Norbury*, 4 Madd. 191; et vide *Terry v. Terry*, Gilb. Eq. Ca. 10. Where a charge is paid off, or a

Trustees cannot lend money on mortgage without power.

hold premises to the defendant Scarfe for 900l.: the bill was brought against the mortgagee and the husband for an account, and for the direction of the court.

Curtesy of equity of redemption on mortgage in fee allowed.

Equity of redemption, how considered in Chancery.

Seisin.

Assets.

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Devise.

The defendant, the husband, insisted that, having had issue by his wife, he was entitled to an estate for life in his late wife's freehold premises as tenant by the curtesy, subject to the mortgage of the defendant (b); and the Master of the Rolls, on hearing the cause, was of opinion the defendant Inglis was not entitled to a tenancy by the curtesy in the estate mortgaged, and decreed accordingly. But this decree was reversed on appeal to Lord Chancellor Hardwicke, who, in giving judgment on this point, said, that the question depended on two considerations; first, on what sort of interest an equity of redemption was considered to be in that court; secondly, on what was necessary to entitle a man to be tenant by the curtesy. First, an equity of redemption had always been considered as *an estate* in the land, for it might be devised, granted (T), or entailed with remainders; and such entail and remainders might be barred by fine and recovery: and therefore it, could *not be considered as a mere right only*, but must be taken to be such an estate whereof there might be a seisin (U). That the person, therefore, entitled to the equity of redemption was considered as the owner of the land, and a mortgage in fee was taken to be personal assets. That, by a devise of all lands, tenements, and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed (W); and that if, after such devise made,

(b) *Casborne v. Scarfe and Inglis*, Mr. Pepy's MS. note of this case, 1 Atk. 603. [S. C. Ca. temp. Hardw. 2 Jac. & Walk. 18. 194, which does 499, 2d edit. by Lee. 7 Vin. Abr. not vary as to this point from the 156. Et vide post, 289, 90, as also report in Atkins.—Ed.]

(T) The contrary was argued in 1 Ch. Ca. 219; but ruled as above, and as in p. 252, ante.

(U) S. P. ante, 252, n. (G).

Devise.

(W) The rule as to this is, that general words adapted to the devise of real estate only will be sufficient to pass the legal and beneficial interest in mortgages in fee, provided the uses or trusts to which such real property is to be applied are not inconsistent with the supposition, that the mortgages were meant to be included in the devise. See further, *infra*, 420, in *notis*, latter end of Lord Eldon's judgment in *Braybroke v. Inskip*, there cited.

a foreclosure was had; yet such estate would not pass by those general words, of lands, tenements, and hereditaments; because a foreclosure was considered as a new purchase of the lands. That the interest of the land must be somewhere, and could not be in abeyance; but it was not in the mortgagee, and therefore must be in the mortgagor (x). That it was certain the mortgagee was not barely a trustee to the mortgagor, but to some purposes, namely, with regard to the inheritance, he certainly *was*, until a foreclosure. Secondly, at common law, four things were necessary to entitle the husband to be tenant by curtesy, *vis.* marriage, issue, death, and seisin in fact. In this case the three first concurred, but it was objected, that here was no seisin whatever of the legal estate in the wife in the consideration of law. However, that was not the present question; the true question was, whether there was such seisin or possession of the equitable estate in the wife, as, in *that court*, was considered as equivalent to an actual seisin of a freehold estate at common law? And his Lordship was of opinion, that there was. Actual possession, clothed with the receipt of the rents and profits, was the highest instance of an equitable seisin, both of which there was in this case; and that a husband should be tenant by the curtesy of the equitable estate of the wife, had been often determined. It was so held in *Sweetapple v. Bindon* (c) (y), which was a much stronger case than this; for, in that case,

Foreclosure.

Abeyance.

Seisin of equity of redemption.

Receipt of rents, highest instance of equitable seisin.

(c) 2 Vern. 536. [S. C. 1 Eq. Ca. Abr. 394, pl. 6.—Ed.]

(X) This must be understood as referring to the equitable freehold; for the legal estate of freehold is clearly in the mortgagee. See ante, 157, in *notis.*

(Y) The case concerned money directed to be laid out in land; and though the money had not been invested according to the trust, the husband was decreed curtesable of it. The interest of the money during coverture did not appear to have been received either by the husband or by the wife, so as to form a kind of *quasi seisin* of the principal; nor in fact is such receipt of interest necessary to entitle a husband to curtesy out of money-land, provided the money still continues impressed with the character of land and remains unconverted into personal property. See, on this subject, *Dobson v. Hay*, 3 Bro. C. C. 404. *Cunningham v. Moodey*, 1 Ves. 174. 176. Lord Eldon's act, 39 & 40 Geo. 3. c. 56. and cases thereon, collected in *Cov. Rec.* 148, with the addition of *Baynes v. Baynes*, 9 Ves. 462.

Curtesy of money-land.

Equitable estate devisable.

there was neither seisin nor land: and, in 2 Vern. 680, it was held that lands, articted for only, would pass by a will (z).

His Lordship said (d), the principal objections to the husband's claim were two: first, laches and neglect in the husband by not paying off the mortgage. Secondly, that the rule ought to be equal between dower and curtesy, and that dower could not be of a trust-estate. As to the first, it was not similar to the cases of laches in the husband, viz. as in a case where entry was requisite (e); because it was nothing near so easy to pay off a mortgage as to make an entry: and it held equally strong in the case of a trust-estate; for a husband might more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which was necessarily attended with many delays.

Tenant by curtesy must keep down interest of mortgage.

The second objection proved too much, if any thing, and entirely failed by the precedents of that court: if any innovation were to be made, his Lordship was of opinion, that the nearest way to right would be to let in the wife to dower of a trust-estate (A), and not to exclude the husband from being tenant by the curtesy of it (f). There could be no inconvenience to the heir at law, for he would have the same remedy in this court, to make a tenant by the curtesy keep down the interest, as against any other tenant for life (ff). For these reasons his Lordship was of opinion, that the defendant was entitled to be tenant by the curtesy, and the decree at the Rolls, as to this part, must be reversed.

(d) *Sweetapple v. Bindon*, 2 Vern. 536.

(e) *Ibid.*

(f) *Ibid.*

(ff) [S. P. *Corbett v. Baker*, 3 Anstr. 759.—Ed.]

Equitable and future interests devisable.

(Z) For, *per cur.* an equitable interest is as well devisable as a legal estate: and a future interest may also be devised. *Greenhill v. Greenhill*, 2 Vern. 680. S. C. Pre. Ch. 320. Eq. Ca. Abr. 174, pl. 4. As to this, see further 1 Pres. Abs. 68. 3 Ib. 259.

No dower of equity of redemption.

(A) Consistency of principle has, however, been made to give way to the security of titles: and it is now decisively established, without danger of further discussion, that a wife is not dowable of a trust estate, nor of an equity of redemption. See *Godwin v. Winsmore*, 2 Atk. 525. *Curtis v. Curtis*, 2 Bro. C. C. 620. S. C. *arguendo*, 2 Ves. jun. 124. *D'Arcy v. Blake*, 2 Sch. & Lef. 388. Et vide etiam *Burgess v. Wheate*, 1 W. Bl. 160. 182. S. C. 1 Eden Rep. 177, and post, 688.

But, in order to entitle the husband to be tenant by the curtesy of the trust-estate of his wife, the wife must have the inheritance; *and there must likewise be a seisin of a freehold [either in law or in equity] during the coverture*; and (g) therefore where freehold, copyhold, and leasehold estates were devised by a father to trustees, &c. in trust to apply the residue, after paying their own charges, to the sole use of his daughter, during her life, and to be at her disposal, and not subject to the debts or controul of her husband, her receipts to be good; and to permit her by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estates, as she should think fit: Lord Hardwicke held, that the husband was not entitled to be tenant by the curtesy, upon the ground of the husband's having no *seisin* either in *law* or *equity* (B): for, though the wife had

Equity of redemption settled to separate use of wife, husband not curtesable.

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(g) *Hearle v. Greenbank*, 1 Ves. 298. [S. C. and P. 3 Atk. 695. 716.—Ed.]

(B) His Lordship was of a different opinion in the case of *Roberts v. Dixwell*, 1 Atk. 609, determined about ten years before. In that case he decided, that a husband might be tenant by the curtesy of an estate devised to the wife for her separate use. The authority of this position is considerably shaken if not entirely over-ruled, by the case cited in the text, which, on mature deliberation, seems to be the preferable decision. But see 3 Pres. Abs. 382. 470. and Watk. Elem. of Conv. 55, 3d edit. where the point is still dubiously expressed. There cannot however, it is presumed, be much difficulty in selecting between these conflicting adjudications, since *Hearle v. Greenbank* is not only the latest decision, but also the one most accordant with principle. To the completion of curtesy of an equitable estate, there must be an equitable seisin of the equitable freehold and inheritance *simul et secul*, in the same manner as a concurrence of these seisins is necessary to the curtesy of a legal estate. If therefore the equitable freehold be in trustees, in trust for the separate use of a feme covert, a leading and essential circumstance is wanting to complete the curtesy of the husband, namely, a concurrent seisin in the wife of the equitable freehold and inheritance *simul et secul*: and it is observable, that the secondary trust of the freehold, which is in the wife as her separate estate, will not merge in the primary equity of the inheritance so as to make the wife seised of the immediate estate of inheritance, otherwise the very general and cautious mode of conveying an estate of equitable freehold to trustees for the separate use of married women, would in many instances, be entirely nugatory and useless. Considering the rule in equity to be so established, it is a necessary consequence that the equitable separate estate for life in the wife, being kept distinct during the coverture from her equitable reversion or remainder in tail, she will not have

Case in text opposed by Roberts v. Dixwell, now over-ruled, semb.

No union of wife's separate estate for life, with her equitable remainder in tail or in fee so as to give husband curtesy, semb.

the inheritance, and there was a kind of seisin, *that was an equity*, a trust of the profits for her life; but the father, whose estate it was, had made his daughter a *fême sole*, giving her the profits during her life, *but not subject* to the controul of her husband. Then the husband had no seisin in equity during the coverture; and this was essential to a tenancy by the curtesy; and such tenancy, in this case, would be directly contrary to the intent of the testator.

Creditors of
husband may
(after his death)
redeem term

Creditors of the husband were held to be entitled to redeem a term purchased by him (*h*) after marriage, to himself and his

(*h*) *Watts v. Thomas*, 2 P. Wms. 365.

had at any period during the marriage that actual seisin of the whole equitable inheritance which is necessary to give rise to an equitable tenancy by the curtesy.

Ruled contra.

In a late case, however, where the question occurred, it was ruled, that the husband will become tenant by the curtesy of the equitable inheritance of his wife, notwithstanding there be a direction to pay the rents and profits to her separate use during the coverture, *Morgan v. Morgan*, 5 Madd. 408. His Honour in delivering his judgment, said, he “proceeded upon the principle, that at law the husband is entitled to curtesy wherever the wife, during the coverture, is seised of an estate of inheritance and has issue by the husband capable of taking that inheritance.” It is however to be observed that the mere seisin of an estate of inheritance will not confer curtesy if the husband has not the immediate freehold *simul et semel* in right of his wife. Suppose him to have, in his own right, an estate *pur autre vie*, namely, for the life of the person whom he afterwards marries, and who has the immediate legal remainder in fee, the husband in this case will not be entitled to the estate after his wife’s death, because he was not during her life seised of her estate of inheritance; yet the wife is seised of an estate of inheritance within the terms of the above definition. His Honour proceeded:—“Equity follows the law in the quality of estates, and it is to be stated generally, that a husband will become tenant by the curtesy, wherever the wife, during the coverture, is in possession of an equitable estate of inheritance and has issue by the husband capable of that inheritance. There is no doubt here that the wife had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life. Lord Hardwicke admitted this proposition in *Hearle v. Greenbank*, and it is so expressly decided in the case of *Pitt v. Jackson*, 2 Bro. C. C. 51, where the conveyance being directed to the daughter a feme covert in tail, there was, notwithstanding, a direction to pay the rents and profits to her separate use during the coverture: and this doctrine has also the authority of Mr. Fearne, in his book of Contingent Remainders, in his comments upon the case of *Roberts v. Dixwell*. The wife was in possession of this equitable estate by receipt of the rents and profits during the coverture, and there being issue capable of taking the inheritance, the husband, according to

wife and the survivor, and the executors, administrators, and assigns of such survivor, and afterward assigned by him, without her joining in mortgage, with a proviso to be void on payment of the money by him or his wife, or the executors of him or his wife, and under a proviso that until default of payment, the husband, his executors, and administrators, should equally enjoy; for the settlement of the term upon the wife being after marriage is a voluntary conveyance, and being only a term for years, it was always in the power of the husband to forfeit or alien, and the mortgage was an alienation; for though if the mortgage money had been repaid before the day, the mortgage would have been void, and consequently all things in *statu quo*; yet the mortgage being forfeited, the equity of redemption (always in the husband's power) became a creature of equity (c); and in the case of creditors, and where the redemption was given as well to the executors of the husband as of the wife, and the last proviso was, that the husband, his executors, &c. might enjoy till default of payment, was assets.

purchased by him and settled after marriage on himself and wife and survivor, and after mortgaged by him alone.

the rule stated, must be entitled to curtesy; unless it can be held that the direction that the wife shall take the profits to her separate use amounts to an express intention to exclude him. At law the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly, by a direction that upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to be tenant by the curtesy [and having that she may redeem]. Such a provision was actually made in the case of *Bennett v. Davis*, 2 Pr. Wms. 316, and was acted upon by this court. Here the husband is partially and not wholly excluded from the enjoyment of his wife's property. This court would, according to the intention of the settlement, have restrained him from all interference with the rents and profits during the life of the wife, but there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of his wife." 5 Madd. 411. 412.

Wife in equity may have entire dominion over estate and may redeem; contra at law.

(C) The subsequent part of this paragraph reads thus, from the report:— [291 *]
 "And it being the case of creditors, and the redemption given as well to the executors of the husband as to the executors of the wife, and the last proviso being that the husband, his executors, &c. may enjoy till default of payment; the Master of the Rolls decreed that the equity of redemption of this term was assets."

Correction of text.

Interest on first mortgage in arrear must be paid by subsequent mortgagee redeeming (D).

If a prior mortgagee does not bring an ejectment to recover possession (i), and the interest runs in arrear, a subsequent mortgagee shall, notwithstanding, not be permitted to redeem, without paying the whole interest so run on; because, though

(i) *Aston v. Aston*, 1 Ves. 268.

Arrear of interest recoverable.—That debt is to carry interest, presumed.

(D) Interest in arrear does not carry interest, but it may be recovered, though suffered to accumulate for a period of twenty years, or even longer, if there be any circumstance occurring during that period to keep alive the mortgage, (concerning which, see post, 415.) Interest in arrear is not a simple contract debt barrable by the statute of limitations. The mortgage is given for securing the principal sum *and interest*. The interest therefore, though in arrear, is as much a charge on the land as the principal money; and supposing the word “*interest*” to be omitted in the mortgage deed, it is conceived the estate would still be liable to all arrears; for interest is to be viewed not merely as an accident to the principal, but in fact as part of it, in the same manner as fruit is part of a tree. 3 Meriv. 566. The yearly produce is to be considered as included under a general loan of the principal, and consequently as secured by the deed which secures the principal; besides, the payment of interest is a prominent object in the mortgage transaction, and will in all cases be presumed, unless the contrary be expressed. *Farquhar v. Morris*, 7 T. R. 124. But it is otherwise on simple contract or specialty debts. 2 Barn. & Cress. 348. et infra, vol. ii. 920.

Presumptions from letting interest run in arrear.

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Arrears on first mortgage not to prejudice subsequent incumbrancer.

In the case of *Aston v. Aston*, cited in the text, the owner of the charge let it run in arrear eight years, and it was held, that that circumstance was not alone sufficient to warrant the presumption, either that the interest was absolutely released, or that such neglect of demanding it was intended to prejudice the remainder-man. If, however, there be any connivance or unfair conduct between the particular tenant (who is bound to keep down the interest, post, 920, 1,) and the incumbrancer, so that the interest be suffered to run in arrear, and be ultimately saddled on the remainder-man through the death or insolvency of the particular tenant; the circumstances of fraud and unfair dealing will have the effect of deteriorating the demand of the incumbrancer against the remainder-man, in proportion to the flagrancy of the conduct proved. Thus, in *Bentham v. Haincourt*, Pre. Ch. 30. S. C. 1 Eq. Ca. Abr. 320, and post, 931, 2, where the first mortgagee had taken possession of the estate; and yet suffered the mortgagor, who was his son-in-law to receive the rents, whereby his interest became in arrear; it was held that this conduct should not affect the lands, so as to keep out a second mortgagee longer than he would have been kept out if the interest had been regularly paid. The court in this case, as well as in that of *Aston v. Aston*, ubi supra, seemed tenacious of entirely depriving the prior incumbrancer of his arrearage, but was willing to postpone him, in order that the subsequent incumbrancer might not receive any injury from the neglect or contrivance of the first mortgagee. But supposing the rents not to be sufficient to cover the interest of all the charges on the land, then, it is conceived the right of the mortgagee so tampering with the profits would be wholly lost

the second mortgagee could not enter, he was not without remedy; for he might have brought a bill to redeem, and so had

as against the subsequent incumbrancer, but not perhaps as against the mortgagor and his heirs; for though the tenant for life omits to keep down the interest, yet as between the mortgagee and the estate, the mortgagee has a right to be paid out of the estate into whatsoever hands it may come. *Lord Pourkyn v. Hughes*, 5 Ves. 106. In one case indeed a mortgagee, who permitted the mortgagor to make use of his incumbrance to keep out other creditors, was said to be chargeable with the profits from the time that the creditors would have had a remedy, had it not been for his interposition; for equity would not suffer a man to make use of his securities to protect a debtor from the just demands of his creditors. *Chapman v. Tanner*, 1 Vern. 267. 3 Bac. Abr. 658. Et vide *S. C.* post, 951. On the authority of this case *Coppring v. Cooke* (1 Vern. 270. *S. C.* post, 949, 50,) was decided. There the mortgagee obtained judgment in ejectment, and entered into possession of the mortgaged premises, and thereby prevented other creditors who had subsequent securities from entering, and yet permitted the mortgagor to take the profits; and it was held by Lord Keeper (North) that he should be charged with all the profits he had or might have received since his entry. *S. L. Harvey v. Tebbut*, 1 Jac. & Walk. 203. Et vide *Berney v. Sewell*, Ib. 650. Et infra, 946, 7.

Mortgagee in possession must account for such rents as he might have received.

The principle of these decisions hath been recently recognized and acted on by the late Chancellor of Ireland, in the case of *Loftus v. Swift*, 2 Sch. & Lef. 655 (1806); and by the present Master of the Rolls when Vice Chancellor, in the case of *Roe v. Pogson*, 2 Madd. Rep. 457 (1816). The case of *Loftus v. Swift* we shall have occasion to notice more in detail in the sequel of this chapter, see the latter end of the note to p. 385, post, which will render it unnecessary to state more here than that the interest contended for had been in arrear upwards of fifty years. The mortgage had been kept alive by the application of certain principles adopted in courts of equity, which will be fully explained hereafter. The question, said the Chancellor (Lord Redesdale), was, whether the conduct of the mortgagees (the Trustees of St. Patrick's Hospital, Dublin), with respect to the interest, was such that laches might be imputed to them which would bar them of their demand of interest? The ground on which he entertained a doubt on this question was, that the mortgagees had had dealings with Swift, which might fully have informed them that Swift was only tenant for life; and Lord Redesdale said, he wished to have the question fully discussed, because it was an injury to persons entitled to estates under settlement, that a tenant for life should be permitted to hold the estate without paying the interest accruing on charges which affected the estates in remainder as well as the estate for life. He thought the question had been discussed before; but he could not recollect in what case till the case of *Aston v. Aston*, ubi supra, was mentioned at the bar, which brought fully to his recollection what had been before floating on his mind. Lord Hardwicke there entered into a discussion of the point; and the clear result from what Lord Hardwicke said, was that mere laches, mere neglect to demand the interest from the tenant for life, should not prejudice the demand of the incumbrancer against the remainder-man, leaving the question open whether any thing beyond mere laches

Incumbrancer entitled to arrears against remainder-man, though by laches he omit to obtain interest of tenant for life: seems if incumbrancer be guilty of misconduct.

Receiver, when appointed.

the estate himself: but if he does not, the Court of Chancery has often appointed a receiver to keep down the interest, which

could have that effect. There were cases Lord Redesdale thought from which it might clearly be inferred, that unfair conduct would have that effect; and *Bentham v. Haincourt*, ubi supra, was one where the decision of the court must have proceeded on the ground, that the conduct of the first mortgagee amounted to more than mere laches. So it was to be inferred from *Chapman v. Tanner*, *Copping v. Cole*, and *Muller v. Stephens*, 2 Ca. in Ch. 207, (which last by the way is not in point) that acts of a mortgagee, favorable to the mortgagor and prejudicial to subsequent incumbrancers, might deprive him of the right he would otherwise have to charge the arrear of interest due to him against the estate. However, in all these cases there was something of contrivance, some positive misconduct to warrant the decision; but in the case before the court (*Loftus v. Swift*) there was nothing but mere laches. His Lordship then went into a minute detail of circumstances, which he said proved, that if there was any neglect on the part of the hospital, there was also clear evidence of laches in other matters of the same transaction against the persons who claimed to be exempt from the payment of the arrearages; and Lord Redesdale concluded by observing, that taking the whole case into consideration, he thought he could not deprive the hospital of the arrear of interest, except so far as by their own acts they had deprived themselves of the arrears due prior to the year 1755.

Same law. Latest case.

In *Roe v. Pogson*, ubi supra, a petition was presented stating transactions for upwards of sixty years, and praying various relief. Sir Thomas Plumer, Vice-Chancellor, doubted the propriety of bringing the question before the court on a petition; but in the course of his judgment expressed his opinion to be, that an incumbrancer on an estate will be entitled to arrears of interest in respect of his incumbrance, and to charge the estate with the same as against a remainder-man, though there might have been neglect or laches on his part in not making for many years a claim of interest against the tenant for life; and cited *Loftus v. Swift*, ubi supra.

Arrears answerable out of assets of tenant for life.

It is further observable, that if a tenant for life omit to pay the interest regularly, and dies, leaving an arrear unpaid, his assets will be answerable to the next remainder-man for such deficiency, infra, 311. 923, in notis. And if there be a tenant for life with remainder to B. for life, with remainder to C. in tail, with remainders over, and the first tenant for life neglects to pay the interest of incumbrances, and dies, leaving B. surviving, the rents and profits of the estate in the hands of B. must be applied in reduction of the interest accruing prior as well as subsequently to the commencement of his estate, *Penrhyn v. Hughes*, 5 Ves. 106, 107. *Tracey v. Hereford*, 2 Bro. C. C. 128. Infra, 922; and B. will be left to recover over as he can against the assets of the preceding tenant for life, according to the rule laid down in *Finch v. Finch*, 1 Ves. jun. 535.

Mortgagee purchasing life estate, liable to arrears.

Lastly, it is observable, that if a mortgagee permit the tenant for life to run in arrear for the interest, and afterwards purchases the estate for life, and takes possession under that purchase, he will be bound to apply the surplus rents and profits beyond the current interest, in discharge of the arrear; for if he had entered as mortgagee, the surplus rents and profits would have

the court will not in general do, unless where the prior mortgagee will not enter (E): but if he does not take that remedy,

been clearly applicable in discharge of the arrears; and it would be inequitable to allow him to prejudice the rights of the reversioner by entering as a purchaser. *Penrhyn v. Hughes*, ubi supra. The decree in that case was, that an account should be taken of principal, interest, and costs, and of the rents and profits received by the mortgagee since his entry into possession as assignee of the tenant for life, which rents and profits were to be applied first in payment of the interest which accrued due subsequently to his entering into possession; and in the next place so far as they would extend in satisfaction of the preceding arrears.

See further as to the persons who are bound to keep down the interest on incumbrances, post, 920, 1, *et seq.* And as to applications to the court by the remainder-man to put a receiver on the tenant for life, see next note, particularly Sect. VI.

OF RECEIVERS.*

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(E). It is intended in this note to take a connected view of the appointment, power, and office of a receiver, with other matters relating thereto. The following observations are relevant to a receiver appointed by the court only, and not to a receiver appointed by the parties. The deed of appointment is the rule by which the latter must act, and not the rules which courts of equity adopt for the regulation of their own officers. The receivership deed therefore should be perspicuously worded, and ample powers conferred on the person appointed. A form of this deed will be found in the Third Volume, where also some additional observations on the economy of the instrument will be introduced in the notes. The arrangement, under which it is proposed to treat this subject, is to consider, I. The general character of a receiver. II. The mode in which, and the time when, he is and may be appointed. III. Who may be a receiver. IV. What security he will be required to give for the due performance of his office. V. The cases in which a second mortgagee may have a receiver appointed on the first incumbrancer. VI. When a remainder-man may move for the appointment of a receiver on the tenant for life. VII. When an order for a receiver will be granted on the motion of one tenant in common against his companion in possession. VIII. Other instances of his appointment. IX. The power and duty of a receiver, 1st. in laying out money; 2d. in letting the premises; 3d. in distraining for rent; and, 4th. in bringing and defending ejectments. X. The time and mode of the receiver's accounting. XI. His salary and allowance. XII. The consequence of his losses and embezzlements, and herein of his indemnification. XIII. The mode of his discharge. And, XIV. The power

Subject and arrangement of note.

* The Editor trusts that the insertion of the following long and apparently uncalled-for note here, will find an ample apology in the frequent recurrence of the subject of it in practice, and in the numerous collection of authorities which it contains. The doctrine of receivership is intimately connected with mortgage transactions; and the ensuing epitome embraces many cases not to be found in the equity text books.

he [the subsequent mortgagee] shall not redeem without paying

RECEIVER. and office of a consignee of colonial estates, who is in the character of a receiver.

Receiver, what and who he is.

I. A receiver is an indifferent person appointed by the Court of Chancery to receive the rents and profits of land or other thing in question pending a suit, where it does not seem reasonable to the court that the parties themselves should be in receipt of the rents. And he is to account for such his receipt when the court shall require him: and to secure his doing so, he is commonly ordered to enter into a recognizance with two or more sureties, in such a sum as the court shall direct. *Prac. Reg. Ch. 299. 3 Atk. 237.* A receiver is truly and properly the hand of the court. He will therefore be put in possession in a summary way. The court will order the tenants to attorn to him; and, if necessary, grant him a writ of assistance, without first awarding an injunction, which is, in other cases, the usual process. Per Lord Parker, *3 Cox P. Wms. 379, n. (C).* The power of appointing a receiver is a discretionary power exercised by the court, and does not affect the rights of the parties. *Skip v. Harwood, 3 Atk. 564. 2 Atk. 15. Sharp v. Carter, 3 P. Wms. 379.* The receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the Master; and after the date of that order the owner of the equity of redemption is not at liberty to exercise any right of ownership on the estate as to cut timber or otherwise, without the authority of the court. *Tanfield v. Weston, 2 Sim. & Sta. 98.*

Mode of his appointment.

II 1. The mode of appointing a receiver is by motion to the Lord Chancellor for a reference to the Master to appoint a proper person to be receiver of the rents and profits of the estate. The court acquiescing in the motion, makes an order directing the Master to appoint a proper person accordingly, and to allow him a salary, he first giving security, &c. The tenant for life, if any, is then ordered to deliver up possession of the estates to the receiver, and the tenants are directed to attorn and pay their rents to the receiver, who is to be at liberty to let the premises with the approbation of the Master. The Master is ordered to inquire what incumbrances affect the estate, and of their priorities; and the receiver is then directed, out of the rents and annual proceeds of the estate, to pay the interest of the incumbrances according to the priorities thus ascertained; and to pay the balances reported due from him into the bank, with the privity of the accountant-general of the Court of Chancery, to the credit of the cause subsisting between the parties, subject to the further order of the court. Other directions are then added to meet the circumstances of the case.

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Proposal of person to be receiver, by whom made.

II 2. The reference is to the Master to appoint a proper person to be receiver. A proposal of some person is then made to him, usually by the owner of the estate. But it is an indulgence in a mortgagee to suffer the owner of the estate to propose a receiver, and he is not bound to do it; if, therefore, the mortgagee propose one person, and the mortgagor another, the proposal of the former will be preferred. *Wilkins v. Williams, 3 Ves. 589.* The proposal cannot be made by a stranger, *2 Madd. Rep. 249*; for in all the cases that have occurred, it has been made by a party interested. This proposal

that arrear: and though a mortgagee often suffers the arrear

the Master may approve or reject. In forming his judgment he is said to be much influenced by the approbation of a majority of the parties particularly interested in the appointment. 1 Turn. & Ven. Prac. 148. If he disapproves of the proposal, and the parties are not satisfied, they may apply to the Chancellor, who will direct the Master to state his reasons for rejecting the receiver. But when the Master has approved of one or two persons proposed, the court will not disturb his choice, unless the person chosen be shewn to be unfit or improper, or unless there be a personal objection to the man. And in no case will the court enter into a comparison of the more or less fitness of the competitors, nor into small discussions as to who shall be the receiver and have the allowance. *Attorney-General v. Day*, 2 Madd. Rep. 253. *Thomas v. Dawkin*, 3 Bro. C. C. 507. S. C. 1 Ves. jun. 452. *Creuze v. Bishop of London*, 2 Bro. C. C. 252. *Garland v. Garland*, 2 Ves. jun. 137. *Bowersbank v. Colasseau*, 3 Ves. 164. *Wilkins v. Williams*, Ib. 588. *Thorpe v. Thorpe*, 12 Ves. 317. *Egginton v. Flarell*, stated from MS. 2 Madd. Rep. 253. But note, that exceptions to the appointment of a receiver may be taken by petition. *Hughes v. Williams*, 6 Ves. 459.

RECEIVER.

II 3. In *Attorney-General v. Day*, ubi supra, it was made a question by the Vice-Chancellor, whether, if the parties neglect to propose a receiver, the Master may appoint one himself; or whether an application must not rather be made to the court? His Honor inclined to the latter opinion, but would not decide the question then, nor say that the Master could not in any case appoint a receiver: but, in the case before the court, the neglect of the parties was accounted for; and the Master was thereupon directed to review his report, and to entertain the proposal of a receiver made by the parties, which, in effect, annulled the appointment made by the Master in the interval.

Parties neglecting to propose, Master may appoint receiver.

II 4. The court has, at all times, evinced a great reluctance in controuling the Master's approbation and appointment of a receiver, without a special case. *Anon.* 3 Ves. 515. There must of necessity be a degree of discretion confided in officers appointed for the management of concerns, full of detail and complicated circumstances; and those who impeach the judgment of those officers upon such points, must shew a reason for the exception. Lord Alvanley therefore in *Bowersbank v. Colasseau*, ubi supra, states truly, that the judgment of the Master is not to be disturbed, only upon special grounds and a strong case, to shew that the person appointed ought not to be the receiver. Et vide *Thorpe v. Thorpe*, 12 Ves. 320.

Master's approval not disturbed but on special grounds.

II 5. When it is said that a receiver may be appointed on motion, it must be understood to be a motion in a cause; for there is not any instance, except in the case of idiots and lunatics (1 Atk. 578), of a receiver being appointed where there is no bill filed. *Anon.* 1 Atk. 489. *Mountfort Ex parte*, 15 Ves. 445. Sed vide *Pitcher v. Hether*, 2 Dick. 580, *contrd.* So it was said in *Whitfield Ex parte*, 2 Atk. 315, that the court had not a jurisdiction to appoint a receiver, unless a cause were depending. But immediately after a bill has been filed a motion may be made, and the court will grant a reference according to circumstances. Thus, in *Hugonia v. Basely*, 15 Ves. 105, a receiver was appointed on a motion, before the hearing of the cause, against

Motion for receiver, at what time it may be made.

Before hearing.

to run on, with a design to get in the estate, on which he lent his money, and become the purchaser, which may be called an ill intent, yet he shall not lose his interest.

RECEIVER.

*Before answer
or strong case.*

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a person having the legal and beneficial estate upon a strong ground of suspicion of abused confidence, arising on the answer: and in *Metcalf v. Pulvertoft*, 1 Ves. & B. 180, and *Brodie v. Barry*, 3 Meriv. 695. S. C. 2 Ves. & B. 36. 127, a receiver was appointed *before answer*. But in another case the Chancellor would not appoint a receiver against the legal estate *before the hearing* of the cause, although affidavits were put in swearing the truth of certain facts alleged in the bill. The Chancellor said the court always reluctantly interfered against the legal title, and only in a case of fraud (clearly proved) and of imminent danger. *Lloyd v. Passingham*, 3 Meriv. 697. Et vide S. C. 16 Ves. 59. *Vann v. Barnett*, 2 Bro. C. C. 158. *Middleton v. Dods-well*, 13 Ves. 266. *Scot v. Becher*, 4 Price, 346. *Duckworth v. Trafford*, 18 Ves. 283; and *Maguire v. Allen*, 1 Ball & Bea. 75; and references in note, p. 76: Lord Erskine, however, in a case which occurred previously to that of *Lloyd v. Passingham*, ubi supra, appointed a receiver *before answer*, upon affidavits of misapplication and danger to the property in the hands of an executor. The co-executors were consenting to the order, which made a material feature in the case. His Lordship acknowledged the general principle; and said, that to induce the court to interfere, especially before answer, a strong special ground must be made out. In the case before the court, the property was in danger from insolvency existing or expected; and though the administration was not to be taken from an executor upon slight grounds, yet his Lordship said he must make the order for a receiver in that case. 13 Ves. 269.

Motion may be made after decree, but never ex parte.

II 6. A motion for a receiver may be made *after a decree, though not prayed for by the bill*; but it is at the option of the court whether it will be then granted. See *Cooke v. Gwynn*, 3 Atk. 690. And note, that a motion for a receiver cannot be made *ex parte*; notice of motion must always be given.

Motion for receiver and injunction should be separate.

2 Madd. Ch. 232. An application for an injunction and the appointment of a receiver should be made the subject of two successive motions, *Lawson v. Morgan*, 1 Price, 303; but it may be made in the alternative, as, that the injunction might be dissolved, or a receiver appointed. *Price v. Williams*,

Part of estate.

1 Ves. jun. 401. A receiver may be appointed of an undivided part of an estate. *Calvert v. Adams*, and *Evelyn v. Evelyn*, 2 Dick. 478. 800. (Sed vide what is said of these cases in Sect. vii. infra.) *Street v. Anderton*, 4 Bro.

Mortgagee.

C. C. 414. But a receiver cannot be appointed without the mortgagee's being before the court, if a mortgage appear on the face of the pleadings. *Price v. Williams*, Coop. 31. *sed quere* this case; and see *Dalmer v. Dushwood*, Sect. V 4. infra.

Who may be receiver.

III 1. It is no objection to a receiver that he is a practising barrister; but the solicitor in the cause cannot be a receiver, *Garland v. Garland*, 2 Ves. jun. 137. *Wilkins v. Williams*, 3 Ves. 588. *Lewis v. Morgan*, 5 Price, 42; nor can the receiver-general of the county; for he having, as such, given security to the crown, if he were to become indebted, the crown might, by its prerogative, sweep away all the property, *Attorney-General v. Day*, 2 Madd.

A subsequent incumbrancer may redeem a former one (k). And where there was a mortgage, and the mortgagor after-

Subsequent incumbrancer may redeem, and that, after foreclosure and purchase of equity

(k) *Fell v. Brown*, infra. [403. et vide 2 Bro. Ch. Ca. 276.—Ed.]

Rep. 254; nor can a peer be a receiver, *Attorney-General v. Gee*, 2 Ves. & B. 208. *Pinke Ex parte*, 2 Meriv. 452; nor the next friend of an infant, *Stone v. Wishart*, 2 Madd. Rep. 64; nor a trustee, *Anon.* 3 Ves. 515. *Jolland ats.* —, 8 Ves. 72; but it seems no objection to a receiver, that he is a trustee to preserve contingent remainders; or that he is a trustee with powers of sale and exchange; but if he has power to lease, he will not be appointed. *Sutton v. Jones*, 15 Ves. 584. If a trustee be appointed, he will not be allowed any emolument, unless no other person can be procured who will act with equal advantage to the estate. *Sykes v. Hastings*, 11 Ves. 363. The being a member of parliament or a relation to any of the parties, or being resident at a distance from the estate, are not of themselves absolute disqualifications, but they are circumstances which will be considerably regarded. *Wynne v. Lord Newborough*, 15 Ves. 283.

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III 2. It is a general rule, founded on the jealousy which courts entertain at the interference of the mortgagee with the estate, that if he be in possession, and receives the rents, he shall be allowed nothing for his trouble. *Bonithon v. Hockmore*, 1 Vern. 316. *French v. Baron*, 2 Atk. 120. So in *Chalmers v. Goldwin* it was held, that a mortgagee cannot have profit by way of commission for receiving the produce of the mortgagor's interest. 1 Smith's Rep. 252. But if the estate lie at such a distance from the place of his residence as that he must necessarily have employed a bailiff, if the property had been his own, he will be allowed such sums as he actually paid to a bailiff, Per Lord Chancellor, in *Godfrey v. Watson*, 3 Atk. 518. In *Langstaffe v. Fenwick*, 10 Ves. 405, it was stated that the mortgagee was the attorney of the mortgagor, and in an account settled between them, that he had charged a poundage for having received the rents, in which respect the account was impeached. The Master of the Rolls, at the hearing observed, that nothing was to be considered as evidence that the appointment of a receiver was necessary but that appointment itself; and the court took the circumstance, that a receiver was not appointed as evidence that a receiver was not necessary. As to the acquiescence, the situation of the parties as attorney and client prevented the effect of that. But his Honor did not mean to say generally, that ignorance of the law would open an account; but, as between these parties, standing in the relation to each other as they did, liberty, he thought, must be given to surcharge and falsify, which was ordered accordingly.

Mortgagee cannot be receiver with emolument, but he may pay bailiff.

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Account opened on proof that mortgages charged for receiving.

III 3. In a case which occurred at common law, B. lent A. a sum of money, and secured the same by a mortgage of certain estates in C. The deed went on to recite, that for better securing the mortgage money, it had been agreed between the parties that B. should be receiver of the rents of the estates, with a salary of 40*l.* a year, by way of commission money for his trouble and loss of time; and B. was invested with the power and office of receiver at the stipulated salary accordingly. This was held to be a clause which enabled B. to retain usurious interest. But Mr. J. Ashhurst (Buller and

Mortgagee may receive rents, but usurious, to take salary for it.

of redemption by mortgagees, if latter has notice of incumbrance before foreclosure.

wards acknowledged three judgments to other persons for other money due (1), two of the persons to whom the judg-

(1) *Grenvold v. Marsham*, 2 Ch. Ca. [et vide *Churchill v. Grove*, Nels. Ch. 170. [S. C. post, 547, et seq.—Ed.] Rep. 89. 1 Cha. Ca. 35. *Shermer v. Crisp v. Heath*, 7 Vin. Abr. 52, pl. 2. *Robbins*, Finch. Rep. 406.—Ed.]

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continued.
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Grose, J.'s agreeing with him) considered it competent to the plaintiff to appoint the defendant receiver of the rents; and if the defendant had merely received the rents in that character, the transaction would have been perfectly innocent; so that the defendant would not have been guilty of usury if there had not been a usurious taking. *Scott v. Brest*, 2 T. R. 241, cited and acknowledged by Lord Eldon in *Chalmers v. Goldwin*, 9 Ves. 260. In like manner Lord Redesdale observed in *Carew v. Johnstone*, 2 Sch. & Lef. 301, that the mortgagee was not entitled to charge receiver's fees for himself, though he might if he actually paid a receiver. But the evidence was, that the mortgagee received for himself. This, therefore, was fraudulently erroneous, and taking an advantage to himself which a mortgagee had no right to do. Et vide *Scatterwood v. Harrison*, Mose. 128. And note, the Court of Chancery will not carry an agreement between the mortgagor and mortgagee for this purpose into effect. *French v. Baron*, 2 Atk. 120.

Salary of receiver appointed by mortgagee not allowed, except when.

III 4. The latest case on this point is that of *Davis v. Denby*, 3 Madd. Rep. 170. There a mortgagee was allowed the expence of a receiver, the mortgaged property consisting of small houses at inferior rents, and the mortgagee living at a distance. The Vice-Chancellor observed:—"This is a case of general importance. A mortgagee cannot be paid as a receiver, nor can he generally and universally, when he takes possession, appoint a receiver. But if the nature of the estate be such that great time and trouble must be sacrificed in the receipt of the rents, he may appoint a receiver. Here the mortgagee resided at Dorking; and the mortgaged property was of such a description that a provident owner of the estate, whose time was of value to him, would probably have thought it right to appoint a receiver. The trustee's residence is immaterial. He was not the person beneficially entitled, nor the person to receive the rents. The charge, therefore, of a receiver during the life of the assignee of the mortgage must be allowed."

Assignment of mortgage bad security for a receiver.

IV. The course of the court, it has been already mentioned, requires a security by the receiver, and two sureties in a recognizance. The taking an assignment of a mortgage belonging to the receiver, instead of pursuing the usual course the court, has been considered improper. *Mead v. Orrery*, 3 Atk. 237. There are cases, however, where a receiver named by all parties interested, has been appointed on his own recognizance only, as in *Countess of Carlisle v. Lord Berkley*, Amb. 599. S. C. 1 Dick. 68. If, upon winding up the accounts, there appears to be a balance due to the receiver, justice requires, that on the application of the surety, he shall be indemnified out of such balance in what payments he may have made for the receiver; and this the court will direct: for the receiver is an officer of the court, and the surety is so in a sense. See further as to sureties, *Brett v. Close*, 16 East,

Sureties.

ments were given (to the intent that, the mortgage being set aside, they might take out execution on their judgments) gave

293. *Glossop v. Harrison*, 3 Ves. & B. 135. Sureties for a receiver are not discharged at their request, *Griffiths v. Griffiths*, 2 Ves. 400, unless their office is at an end, and their accounts are finally settled, in which case they may apply by petition to have their recognizances vacated. 1 Turn. & Ven. Prac. 152. Prac. Reg. Ch. 299.

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V 1. A second mortgagee cannot in general, if the mortgagor be living, have a receiver appointed without the consent of the first mortgagee, because the court cannot prevent the first mortgagee from bringing an ejectment against the receiver as soon as he enters into possession. *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608. *Phillips v. Atkinson*, 2 Bro. C. C. 272. See vide *Dalmer v. Dashwood*, and *Bryan v. Cormick*, ubi infra. Sect. V. 4. for exceptions; but if the estate be in possession of the first mortgagee, and he has been negligent in his accounts, and cannot swear what sum is due to him, the court, at the instance of a second mortgagee, will appoint a receiver. *Codrington v. Parker*, 16 Ves. 469. But the court is very jealous in taking the estate from the first incumbrancer; and therefore if a mortgagee, though he cannot state with any great precision, what sum is due to him, can say, upon oath, that he believes a sum of money is due, and that his mortgage still remains unsatisfied, the court will not take the possession from him, even for the purpose of placing it in the hands of the court; but where he cannot say a shilling is due, the court will take possession of the estate; and if it be a colonial estate, will appoint a consignee. *Quarrell v. Beckford*, 13 Ves. 377, citing and approving the principle laid down in *Chambers v. Goldwin*, reported as to this point, 1 Smith, 252. If there is any thing due, the court cannot substitute another security for that which the mortgagee has contracted for. In a late determination, *Berney v. Sewell*, 1 Jac. & Walk. 647, the Lord Chancellor, confirming what he laid down in *Beckford's case*, said, he knew of no instance where the court had appointed a receiver against a mortgagee in possession, unless the parties making the application would pay him off; and pay him off according to his demand as he stated it himself. He could not appoint a receiver against the defendants, unless their confession was produced that they were paid off, or their refusal to accept what was due to them. The rule about receivers was very clear; if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgage, then if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but if he is in possession, you cannot come here for a receiver, you must redeem him; and then in taking the accounts he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance. And his Lordship said he remembered a case where it was much discussed, whether the court would appoint a receiver when it appeared by the bill that there was a prior mortgagee who was not in possession. Lord Eldon had a note of that case; there Lord Thurlow made the appointment without prejudice to the

When second mortgagee may have receiver appointed.

First mortgagee cannot have receiver appointed.

notice to the mortgagor thereof, and requested him to accept of his money, which, they said, they were ready to pay to him;

RECEIVER. first mortgagee's taking possession, and that was afterwards followed by Lord Kenyon, in *Phipps v. Bishop of Bath and Wells*, ubi supra.

Effect of laches in first mortgagee.

V 2. Laches in the first mortgagee, though it will not deprive him of his legal estate, will turn the countenance of the court against him in favor of the next incumbrancer. Thus, where a second incumbrancer obtained the appointment of a receiver and a decree for a sale, without making the first incumbrancer a party, a petition by the latter for a reference to ascertain priorities was refused, on the ground that the petitioner had commenced a suit for the same purpose, and had delayed it; but leave was given him to bring an ejectment. *Brooks v. Greathed*, 1 Jac. & Walk. 178.

1st. Mortgagee refusing to take possession;

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2d. Mortgagee may insist on appointment of receiver.

V 3. It seems that if the prior mortgagee refuse to take possession of the estate, a subsequent mortgagee may insist upon a receiver being appointed with directions to keep down the interest; and Lord Thurlow appointed a receiver at the instance of one of the mortgagors to keep down the mortgage interest, unless the mortgagee chose to take possession, although the mortgagee opposed the application. This, his Lordship ordered in *Newman v. Newman*, where a receiver was appointed in the place of negligent trustees, notwithstanding the mortgagee opposed the appointment. From the MSS. of Lord Colchester, reported in Belt's edit. of Bro. C. C. vol. ii. p. 91, n. (7).

Cases where receiver has been appointed without consent of first mortgagee.

V 4. As a general rule, it has been stated, supra, Sect. V 1, that a receiver will not be appointed without the consent of the first mortgagee. The three following cases are either exceptions to that rule, or are directly opposed to it. The latter limb of the alternative is most probably the true one, if a choice between them must be made. At least the general applicability of the doctrine is much staggered by the occurrence of these decisions. In *Bryan v. Cormick*, 1 Cox Ch. Ca. 422, a bill was filed by creditors for payment of debts out of real estates which were in mortgage. On a receiver being moved for, an objection was taken, on the general ground, that the court never appointed a receiver of a mortgaged estate without the consent of the mortgagee. The Lord Chancellor asked if the mortgagees were in possession? and it appearing that they were not, his Lordship said he could see no reason if the mortgagee had not thought proper to take possession, why the court should not put a receiver on the estate, so as that it should be without prejudice to the mortgagee's right to obtain the possession; and his Lordship ordered a receiver to be appointed accordingly.—In *Dalmer v. Dashwood*, 2 Cox Ch. Ca. 378, A. having charged his estate with mortgages and other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates, with verbal directions to pay interest to the mortgagees, and to pay over the surplus of the rents to himself. On making a fifth mortgage, A. by deed, appointed B. receiver of the estates comprised in that mortgage, in trust, to keep down the interest of that mortgage, and to pay over the residue of the rents to himself. A. afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee for securing the said annuities in manner therein mentioned, and subject thereto, to permit A. to receive the surplus

and desired him to appoint a time when, and they would pay

monies or rents for his own benefit. At the time of granting these annuities, A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. and B. (without making any other prior incumbrancers parties) the court restrained B. from paying over any part of the rents to A. and appointed a receiver without prejudice to the prior mortgagee's taking possession. The Master of the Rolls, in delivering his judgment, observed, that if a first mortgagee were in possession, the court would not surely prevent his paying over the surplus rents to the mortgagor instead of to the second mortgagee, though the first mortgagee, if he thought proper, might keep it in discharge of his principal. Then, if the first mortgagee would not take possession, why was not this court to give the surplus rents to the second mortgagee? And it never could be necessary to make the first mortgagees parties to such a suit. It was every day's practice to put receivers upon infant's estates which are in mortgage, without having the mortgagees before the court.—So, in a late case (*Norway v. Row*, 19 Ves. 153), the present Lord Chancellor stated himself to be of opinion, that taking care the mortgagees had no legal title set up against them, they had nothing to do with a motion for a receiver. They might enter as mortgagees. The appointment of a receiver would not prejudice that right; and the constant habit of the court, upon such a motion, was not to look at mortgagees farther than to take care that they were not prejudiced.

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Mortgagees nothing to do with motion for receiver, if their legal title not endangered.

And it seems now to be adopted as a general rule, that as between a second and third incumbrancer, a receiver will be appointed at the instance of a second incumbrancer, although the third incumbrancer has obtained possession. This was laid down as between incumbrancers of a rectory. "Where a creditor of a clergyman," said the present Lord Chancellor, "seeks to obtain payment of his debt by judgment and sequestration, he is, in the contemplation of this court, in the same state as any other creditor who has taken out execution, and a creditor having taken out execution, cannot hold property against an estate created prior to his debt. If by *elegit*, one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the creditor; but if there is an antecedent estate, by virtue of which an ejectment may be brought, it does not appear that against the estate the creditors can hold." In the case before his Lordship, the plaintiff could not succeed in an ejectment, because there was a prior estate which might have been set up against him; but though a second incumbrancer, yet being prior to the creditor who had taken out sequestration, it appeared to Lord Eldon that he was entitled to a receiver. *White v. Peterborough (Bishop)*, 3 Swanst. 109. In fact the court will not allow a prior incumbrancer to object to the court's appointing a receiver, by any thing short of a personal assertion of his legal right and a taking possession himself. *Silver v. Norwich (Bishop)*, 3 Swanst. 114.

Second mortgagees may have a receiver appointed against a third in possession.

If first mortgagee objects to receiver he must enter;

It remains to be noticed, that on a motion for a receiver against a mortgagee, who insisted by his answer that he had not been fully paid, the court would not try, by affidavits, the question, whether any balance was due to him

him within a fortnight. It was in proof that no money was

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or not. *Rowe v. Wood*, 2 Jac. & Walk. 557. In this case a motion for the appointment of a receiver upon a mortgagee of mines, who had become a partner by purchasing shares in them, upon the ground of mismanagement, and excluding the mortgagor for interference, was refused; the parties having regulated their rights by subsequent agreement, and the mortgagee not admitting that his mortgage was satisfied; and it was said that the rights and duties of a person in that situation, were not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner, and that if a first mortgagee in possession can in any case be deprived of that possession on the ground of mismanagement, it must be a mismanagement of a clear and specified nature. *Rowe v. Wood*, 2 Jac. & Walk. 553.

but he will be ejected for mismanagement.

Under-mortgagee, being tenant in possession, cannot object to appointment of receiver.

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Receiver not appointed when legal title in dispute unless rents are in danger.

Receiver appointed in favor of equitable incumbrancer.

Remainder-man may put receiver on tenant for life or infant.

V 5. Where a second mortgagee, who had sold part of his mortgage to the tenant in possession of part of the premises, applied for a receiver, the tenant in possession objected, on the ground that the rent, which he was to pay, was just equal to the interest he was entitled to receive on his share of the money due on the mortgage, and that therefore it would but increase the expence by his paying into court, as rent, what he must receive back as interest. But the Barons of the Exchequer thought that the defendant could not unite his two characters of mortgagee and tenant, and that his possession being as tenant; could not be set up against the other mortgagee. They therefore granted an order for a receiver. *Archdeacon v. Bowes*, 3 Anstr. 752. But,

V 6. The court will not appoint a receiver, when the matter in dispute depends on the legal title, unless strong grounds are shewn, and the rents are in imminent danger. *Mordaunt v. Hooper*, Amb. 311. But where a person takes a conveyance of a legal estate, subject to equitable interests, he must satisfy those interests, or submit to the appointment of a receiver. *Per Lord Eldon in Pritchard v. Fleetwood*, 1 Meriv. 55. If, therefore, a purchaser of the legal estate in lands subject to an equitable rent-charge, refuse to pay the rent-charge, a receiver will be appointed. In like manner an equitable mortgagee may apply for a receiver; *Curling v. Lord Leicester*, MS. 2 Madd. Ch. 234; and in a late case where the defendant, on an advance of money, agreed to execute a mortgage, but afterwards refused to perform his agreement, the Vice Chancellor said, take your motion for a receiver: if the defendant had performed his agreement, you would be entitled to bring an ejectment. *Shakel v. Duke of Marlborough*, 4 Madd. Rep. 463. The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed pending the question of the validity of the assignment. *Palmer v. Vaughan*, 3 Swanst. 173. That a receiver may be appointed pending a bill to foreclose, see *Croze v. Halliday*, 2 Ridgw. P. C. 58.

VI. If the tenant for life does not keep down the interest of mortgages and other incumbrances on the estate, the remainder-man may apply to have a receiver appointed with power to pay the interest, and remit the tenant for life the surplus. 1 Sch. & Lef. 407, et vide *Davis v. Duke of Marlborough*, 2 John Wils. 149. 151. And it should be observed, that when a receiver is appointed by the court, he is appointed on the behalf of all parties. *Davis v. Duke of Marlborough*, 2 Swanst. 118. But note, the court will not order the receiver

actually tendered: afterwards the mortgagee exhibited a bill,

of an infant's estate, to keep down the interest of a mortgage debt, unless the master reports it is due. *Anon.* 6 Madd. 9; et vide *Brigstocke v. Mansel*, *infra*, 305.

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On a bill filed by an infant tenant in tail in remainder, a receiver was appointed on his father, tenant for life, with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mortgage, the interest of which (belonging to an infant) was never applied for, except a small portion for maintenance, the residue of the rents being paid into court to the credit of the cause. The father died, and the tenant in tail then in possession, coming of age, suffered a recovery and re-settled the estate, and afterwards died. The Master, by his report, certified that the son was not bound while tenant in tail in remainder, to keep down the interest of the incumbrances, and consequently that the rents paid into court during that period, belonged to his personal representatives. The party claiming to be entitled to the estate under the settlement, petitioned for leave to except to the report on the following grounds:—1st. That in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents. 2. That the direction to the receiver to keep down the interest, amounted to an appropriation of so much of the rents to that purpose; and 3d, That the son, by not claiming the fund when of age, shewed an intention that it should be so appropriated.

Obligation to keep down interest can only be enforced by remainder-man; he barred, question cannot be agitated.

The Master of the Rolls observed, that the direction to the receiver to keep down the rents, was certainly given without the least view to the interests of the real and personal representatives. It was given partly in justice to the incumbrancers, that they might not be injured by the act of the court in taking possession of the rents and profits to which they had a right to resort for the payment of their interest, and partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to resort to proceedings that would be injurious to those standing behind him. The incumbrancers might or might not avail themselves of the order, by applying to the receiver. [S. L. 1 Swanst. 579, *infra*, c. IX. 3.] If they applied to him, they would either be paid their interest, or if he refused or neglected to pay them, they might complain to the court of such neglect or refusal. But if they omitted to apply for the interest, it was to be presumed that they were satisfied with the security they had both for the interest and the principal. The Court did not force payment upon them, nor did it set apart any portion of the rents and profits to answer unclaimed interest. The balance was paid by the receiver, and carried to the credit of the cause, without any previous inquiry whether all the incumbrancers had or had not received their interest. If the estate were not in the possession of the court, one incumbrancer might claim his interest, and insist upon being regularly paid. Another might suffer his to run in arrear. The estate would be discharged of the one, and remain burthened with the other. Why should it be otherwise when the estate was in possession of the court? To benefit the real at the expence of the personal estate was no part of the purpose for which the order was made, although it might be a consequence of the incumbrancers choosing to take the benefit of the direction given to the re-

Reasons for placing receiver on tenant for life.

Incumbrancer loses his interest by suffering receiver to pass his accounts without demanding it.

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[without making the judgment creditors parties, of whose in-

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No appropriation of funds by appointment of receiver.

Rents paid into court by him, personal estate.

When receiver appointed on motion of one tenant in common against his companion.

ceiver. And his Honour held, first, that the general question could only arise in favor of a remainder-man or reversioner, and all such rights were, in the case before the court, barred by the recovery. Second, that the order was not meant to vary the rights of the real and personal representatives, but to prevent the incumbrancer from being prejudiced by the court taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors, and did not amount to an appropriation; and, lastly, that there was nothing in the circumstances to alter the character of the property, which, consisting of rents paid into court, and neither applied in payment of interest, nor appropriated for such payment, was personal estate, and to be dealt with accordingly. *Bertie v. Earl of Abingdon*, 3 Meriv. 560.

VII. The court will not grant a receiver of estates as between tenants in common, except in gross cases of exclusion. The two instances in Dicken's Reports (*Calcett v. Adams* and *Evelyn v. Evelyn*, ubi supra, sect. II 6.) were probably of an aggravated nature, warranting the interposition of the court. The ground for the order in *Street v. Anderton*, 4 Bro. C. C. 414, does not appear. But it was said by the counsel *arguendo*, *Archdeacon v. Bowes*, ubi supra, sect. V 5, that the reason of it was, because the tenant in common in possession, took more than his share of the profits. Mr. Belt states an *Anonymous case*, taken by himself, before Sir W. Grant, M. R. sitting for the Lord Chancellor, 18th Nov. 1802, wherein a receiver was appointed, on the motion of a younger brother, against the eldest brother, who excluded him, on the ground that an agreement made between them to compromise adverse claims, and whereby the eldest brother and heir at law, admitted his younger brother to a tenancy in common with him, was entered into while he (the eldest brother) was in a state of intoxication. Belt's edit. of Bro. C. C. 4th vol. 414, n. (1). In *Milbank v. Revett*, 2 Meriv. 405, a motion was made on the part of the plaintiff, who was a tenant in common with the defendant of an estate in the defendant's occupation, for a receiver, and the application was founded on affidavits of improper management, and of a reservation of the profits, but not amounting exactly to a case of total exclusion. This was met by counter affidavits, stating that a balance was due to the defendant on an unsettled account (to answer which, it seemed, he retained the profits). The affidavits also denied the charges of bad management, and produced instances of interference on the part of the plaintiff. The same learned Judge, who was also then sitting for the Lord Chancellor, said, the question depended entirely on the fact, whether the affidavits did or did not make out a case of exclusion, and on the following day observed, that the affidavits were insufficient to ground such an application upon, adding, that it required a case of the *strongest misconduct* on the part of a managing partner, to obtain a receiver. The motion was consequently refused.

One tenant in common can rarely make a case for a receiver against his companion.

Exclusion, in the true legal sense of the word, is where one tenant in common receives the whole rents and refuses to pay over to his companion the share due to him. A bare notice to the tenants by one tenant in common, not to pay the rents any longer to his companion, is not an exclusion of the other.

incumbrances he had actual notice, as to which see ante, 272;

A motion therefore for a receiver by one tenant in common against his co-tenant, on the ground that the latter had advertised the estate for sale, and had given notice to the tenants to pay their rents to him alone, was refused; because the conduct complained of did not amount to an exclusion. *Tyson v. Fairclough*, 2 Sim. & Stu. 142. In this instance, his Honour the Vice Chancellor, observed, that even in the case of an actual exclusion of one tenant in common by another, he doubted whether the Court of Chancery would appoint a receiver. If it were an exclusion which amounted to an ouster at law, the party complaining must assert at law his legal title. If it were not such an exclusion, a court of equity would compel the tenant in common in receipt of the rents, to account to his companion, but would not act against his legal title to possession, and the reason was, because the party complaining might at law relieve himself by a writ of partition. It was upon this ground that the court had constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction. Where the estate in common is equitable, the court does interfere, because it acts against the legal estate of the trustee only, who is guilty of a breach of trust if he permits one equitable tenant in common in any manner to prejudice the interest of the other. Of the cases cited, *Street v. Anderton*, 4 Bro. C. C. 414, was an equitable estate; *Evelyn v. Evelyn*, 2 Dick. 800, was but a word, and did not explain the nature of the estate; and *Milbank v. Revett*, 2 Meriv. 405; (which was very shortly and very loosely argued) considered that the principles which were applied to partners, were applicable also to tenants in common, which probably would not have been the opinion, if the case had been more fully argued. 2 Sim. & Stu. 142.

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VIII. The Court of Chancery will also appoint a receiver pending a suit in the Ecclesiastical Court to recal probate on a case of strong presumption. The court said, that taking into consideration the evidence respecting the incapacity of the testator—the manner in which the will in question was obtained—the sort of surprise by which the probate was acquired, and the danger to the property, and grounding itself on the jurisdiction in this court to protect property pending a litigation in another court, it was of opinion that this was a fit case for a receiver and an injunction, which were accordingly granted. *Rutherford v. Douglas*, 1 Sim. & Stu. 111. See also *Atkinson v. Henshaw*, 2 Ves. & Bea. 85, and the cases there cited, together with the cases cited in *Ball v. Oliver*, 2 Ves. & Bea. 96.

Miscellaneous instances of appointment of receiver.

In favor of equitable creditors, the court will appoint a receiver on property against which a legal creditor might obtain execution. The rule is stated to be, that the court will, on motion, appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior legal estates, so that such appointment do not prevent their proceeding to obtain possession if they think proper; and with regard to persons having prior equitable estates, the court takes care in appointing a receiver, not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers, permitting legal creditors to act against the estates at law as they please. The ground is, that the

Doctrine on the appointment of a receiver in behalf of equitable creditors.

and post, 1067] and had a decree to foreclose, and then took

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court will not expose parties claiming relief, to the danger of losing the rents by not appointing a receiver of an estate, on which it is admitted they cannot enter, provided it is satisfied in that stage of the cause that the relief prayed by the bill will be given when a decree is so pronounced. *Davis v. Duke of Marlborough*, 2 Swanst. 138. And in later cases, the court has granted that prompt relief to a party possessing a clear equitable title by analogy to the ejectment of a legal incumbrancer. *Duckworth v. Trafford*, 18 Ves. 283. *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 180; and see *Maguire v. Allen*, 1 Ball & Bea. 75.

Partners.

In *Stowell Ex parte*, a solvent partner was appointed receiver of the partnership property, but without a salary. It was ordered, that it should be referred to one of the Masters to settle and approve of the proper security to be taken from the petitioner for the due execution of his office as receiver; that the petitioner should give such security when so approved of and settled; that the petitioner should account from time to time as such receiver, as the Master should from time to time direct; that all proper parties should be examined before the Master upon interrogatories or otherwise touching the matter in question, and should produce upon oath all books, &c. relating thereto, as the Master should think fit; that the petitioner should furnish the assignees with a full and true statement of all the effects and debts of the partnership; that such assignees should be at liberty at all reasonable and convenient times, to inspect the books of the partnership, with liberty for either party to apply; and that the costs of the petition should be paid out of the joint estate. 1 Glyn & Jam. 307.

Executor.

So a receiver will be appointed where an executor and trustee is bankrupt, though the testator knew, after he had made his will, that a commission had been issued. *Langley v. Hawk*, 5 Madd. 46.

Receiver laying out money for repairs.

IX. Formerly a receiver was not permitted to lay out money without a previous order of the court. But now if the receiver has laid out money without such previous order, a reference will be made to the Master to see if the transaction were beneficial to the parties; and if found to be so, the receiver will be allowed the money so expended. *Blunt v. Clitherow*, 6 Ves. 799. *Tempest v. Ord*, 2 Meriv. 56. In *Attorney-General v. Vigor*, 11 Ves. 562, the Lord Chancellor observed, that the court was not in the habit of permitting receivers to apply the trust monies in payment of repairs to any considerable extent, without a previous application; but his Lordship directed an inquiry in that case, on an application by the receiver, to ascertain whether the repairs were reasonable. So where the report stated that the expenditure was for the lasting benefit of the estate, and by the direction of the trustees, an order for the allowance of repairs done by the receivers was made. *Blunt v. Clitherow*, ubi supra. See also *Morris v. Elne*, 1 Ves. jun. 139; and as to the managers of *West India* estates, *Hicks v. Hicks*, 3 Atk. 274.

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He cannot let without an order.

Second. It is the duty of the receiver to let the estate to the best advantage, but he cannot raise the rents upon slight grounds, nor turn out the tenants; nor let even for one year, without an application to the court for an order for that purpose. *Wynne v. Newborough*, 1 Ves. jun. 164. *S. C.* 3 Bro. C. C. 88;

a farther absolute conveyance from the mortgagor for a con-

et vide *Morris v. Elme*, 1 Ves. jun. 139. When a receiver is appointed of colonial property, an inquiry is generally directed to ascertain what shall be the term beyond which the receiver shall not be permitted to let. *Lindsey ats. ———*, 15 Ves. 91. If the receiver have contracted for a lease without the consent of the court, the court will, on motion, refer it to the Master to see if the contract be for the benefit of the parties, or what better rent could be obtained; if the contract be approved, it will be perfected. *Anon.* MS. 2 Madd. Ch. 244; and it is not necessary to give notice of motion to the person contracting to take the lease, but without consent of the court a lease by a receiver will be invalid. *Dunford v. Lane*, 24th January, 1806. MS. 2 Madd. Ca. 244.

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If the receiver have a general authority to let the lands to tenants from year to year, he will, it seems, have also a concomitant authority to determine such tenancies by a regular notice to quit. *Dee v. Read*, 12 East, 56. In *Mansfield v. Hamilton*, 2 Sch. & Lef. 30, Lord Redesdale said, that the tenants from year to year, being tenants to the receiver, he would not turn them out without notice. And it has been held, that a receiver appointed under an order of the Court of Chancery, is an agent within the meaning of the statute of 4 Geo. 2. c. 28. s. 1, which gives double the yearly value of the premises against tenants holding over after demand of possession and regular notice to quit by their respective landlords or their agents. *Wilkinson v. Colley*, 5 Burr. 2698. In that case it was also held, that notice in writing, without any formal demand, was sufficient; for the act was a remedial act, and notice to quit implied a demand of possession.

But he may give notice to quit.

Third. If the owner be in possession of the estate, the receiver cannot distrain, for the owner cannot be tenant to the receiver. In a case of this kind, application should be made to the court for an order directing the owner to deliver up possession to the receiver. *Griffiths v. Griffiths*, 2 Ves. 400. After attornment of the tenants, the receiver may distrain in his own name and on his own authority, without any special leave of the court. (An order for the attornment of the tenants, usually accompanies the receiver's appointment.) Before attornment he must distrain in the name of the person having the legal estate. *Hughes v. Hughes*, 3 Bro. C. C. 85. S. C. 1 Ves. jun. 161; et vide 1 Ball & Bea. 483. In *Pit v. Snowden*, 3 Atk. 750, Lord Hardwicke said, receivers appointed by the Court of Chancery, had a power where they saw it necessary to distrain for rent, and needed not apply to the court for a particular order, and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the mean time. But if there were any doubt who had the legal right to the rent, the receiver (as he must then distrain in the name of the person who has that right), should make an application to the court for an order to distrain. This case of *Pit v. Snowden*, was mentioned in 1 Ves. 162, where the reporter adds a note, that it did not appear whether there had been any attornment or not. After an order to elect, to proceed at law or in equity, a receiver, appointed by the Court of Chancery, cannot, it is said, distrain for rent, without undertaking to proceed in equity only. *Mills v. Fry*, Coop. Rep. 107. The

Receiver may distrain on tenants, but not on owner without order.

siderable sum of money. The two creditors, on a bill ex-

RECEIVER.

register states, that the practice is for a receiver to distrain, upon his own discretion, for rent in arrear within the year, but if the rent be in arrear for more than a year, then an order from the court is necessary. *Brandon v. Brandon*, 5 Madd. 473.

Ejectment cannot be brought, either by or against receiver, without leave of court.

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Fourth. If it be necessary for a receiver to commence, or defend an ejectment, he must, by motion, apply for the leave of the court to do so. *Angell v. Smith*, 9 Ves. 366. When he brings an ejectment, it must be in his own name. *Mansfield v. Hamilton*, 2 Sch. & Lef. 28. If the parties interested are infants, or being adult, consent, a reference will be made to the Master to see whether the ejectment is for their benefit. *Anon.* 6 Ves. 287. In that case Mr. Lloyd (*Amicus curiæ*) said, the understanding was, that where there was a receiver, no person would be permitted to bring an ejectment or take any other proceeding without the leave of the court, whoever did would be committed. And the Lord Chancellor, in *Angell v. Smith*, ubi supra, reiterated the same opinion, and cautioned the solicitor that he would proceed in the ejectment at his peril. So, in *Brooks v. Greathed*, 1 Jac. & Walk. 178, the court laid down the rule clearly, that the possession of the receiver was not to be disturbed without leave of court. The reason why in *Angell v. Smith* the ejectment was permitted to proceed, was, because it had gone so far, per Lord Eldon, (Ch.) In one case where a receiver had been appointed of a mortgaged estate, the mortgagee not being brought before the court, the mortgagee, it was held, was not at liberty to bring an ejectment without applying for leave, which was granted of course. *Bryan v. Cormick*, 1 Cox Rep. 422. In *Wynne v. Newborough*, 3 Bro. C. C. 88, a motion by a remote remainder-man and the tenants in possession to restrain a receiver from ejecting the tenants, was refused, with costs, their interests not being sufficient. The principle of these decisions is, that the receiver is an officer of the court. *Hutchinson v. Lord Massareene*, 2 Ball & Bea. 55. In a late case it was said, that a receiver has a duty not to waste any of the funds in his hands in useless suits in which the parties themselves would not have engaged. The court of Exchequer therefore refused to empower a receiver to sue for debts due to the estate where the proceeding was likely to be oppressive to creditors and to yield no fruits. *Dacie v. John*, 1 M'Lel. 575. 206.

Receiver's account's—General orders.

X 1. It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect, as was remarked by the Lord Chancellor in *Hardwicke v. Vernon*, 14 Ves. 504, (et vide *White v. Lincoln*, 8 Ves. 363) they all stand in the same situation, it is the first duty of these persons to be constantly ready with their accounts. *Pearce v. Green*, 1 Jac. & Walk. 140. By a general order, 15th December, 1792, 4 Bro. C. C. 156. Bea. Ord. Ch. 454, Masters of the Court of Chancery are directed to certify to the Lord Chancellor or Lords Commissioners, the state of receivers accounts in their respective offices on the second seal after Trinity Term in every year. By another general order, 23d April, 1796, cited 15 Ves. 278, it was ordered, that the Masters do fix certain days, on which all receivers shall procure their accounts to be delivered in, and also certain days on which receivers shall pay in the balances due on their accounts, or such part thereof

hibited, had a decree against the mortgagee to pay them their

as the Master shall certify proper to be paid. And it is further ordered, that receivers neglecting to pay in their balances shall not only be disallowed their salary, but also be charged with interest at 5 per cent. for so long time as such balances shall remain in their hands; and it is further ordered, that every receiver, acting under the authority of the court, shall each year procure his annual account to be examined and settled by the Master, within six months after the time fixed for the delivery of the same; and neglect in this particular is to be notified to the court by a certificate of such default made by the Master.

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X 2. Hence, therefore, a receiver must pay in his money yearly; but he can pay nothing out without an order; and it seems that he must pay interest for money kept in his hands, if it be but for a quarter of a year beyond the time when it ought to have been remitted. And in case of his death, his executors will be bound to answer what upon a subsequent inquiry is found to be due for interest on balances retained. *Hovey v. Blakeman*, 4 Ves. 606. And though all parties express themselves satisfied with the conduct of a receiver, yet, in a case where a receiver had misbehaved by keeping money in his hands, Lord Thurlow said, "though the parties are satisfied, I will make them more so, if I find he has kept money in his hands longer than he ought." *Fletcher v. Dodd*, 1 Ves. jun. 85. In *White v. Lady Lincoln*, 8 Ves. 371, Lord Eldon said, it was a principle that ought to be loudly published, that a receiver, who did not pass his accounts regularly, should not be allowed any poundage. If an attorney, who is concerned as well for the mortgagor as mortgagee, be appointed receiver of the rents and profits of the mortgaged estate, and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgages, he will be ordered to pay such balance into court, notwithstanding the general report to be made by the Master as to receiver's accounts has not then been made, on which there might possibly be found to be a greater sum of money due to him than the balance in his hands amounts to. *Lewis v. Morgan*, 5 Price, 52. (Wood, B. diss.)

Accounts to be settled, and balances paid in yearly.

X 3. On the subject of accounts it is further observable, that a mortgagee of a term (created for raising portions, and expired) will not be entitled to a retrospective account of rents and profits in the hands of a receiver accruing before the expiration of the term; for the order appointing a receiver is for the benefit of incumbrancers, only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. If therefore the mortgagee neglects to lay his hands on the rents during the term, he must be in the same situation as a mortgagee in fee who has suffered the rents to be applied for purposes other than the satisfaction of his security, *Gresley v. Adderley*, 1 Swanst. Rep. 579, which situation we have had occasion to notice in a preceding note; vide ante, 291, n. (D); et vide *S. L. Berney v. Sewell*, 1 Jac. & Walk. 650.

Mortgagee not entitled to retrospective account of rents.

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X 4. An action of account will lie against a receiver. Co. Litt. 272 a. 4 Ann. c. 16. s. 27. The receiver may plead in bar to the action, that he never received in fact, or that he has fully accounted, or that a release has

What actions lie against receiver.

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been given, or any other matter tending to show that he was never accountable, or that he has been discharged. 1 Rast. Abr. 121. Rast. Ent. 17. 19. 21. The usual way however is to apply to the court for an order to compel the receiver to bring in and settle his account, and then an action of assumpsit may be brought for the balance; but it should seem from the case of *Fletcher v. Dodd*, 1 Ves. jun. 85, that a receiver will not be obliged to pay any thing without an order of the court, even if a verdict be given against him.

Receiver allowed nothing for trouble.

XI. A receiver is not entitled to any compensation for his trouble beyond his salary, unless what he does is in pursuance of an order of the court. *In re Ormsby*, 1 Ball & Bea. 189.

Mortgagor answerable for receiver's embezzlements, except in cases of fraud and wilful default.

XII. In *Riggs v. Bowater*, 3 Bro. C. C. 365, the Lord Chancellor intimated his opinion without deciding the case, that if a receiver be appointed by the court upon the application of a mortgagee or other incumbrancer, and such receiver afterwards embezzles or otherwise wastes the rents and profits, the loss must fall on the mortgagor.—But the court will not indemnify a receiver appointed by them, if it should appear that he has been guilty of any fraud or collusion in the transaction, or that he has placed the money in a bank, which he knew at the time to be insolvent or nearly so. In a case of this kind the receiver will be obliged to answer the loss out of his own pocket. *Knight v. Plymouth*, 3 Aik. 480. S. C. 1 Dick. 120, cited 3 Ves. 566, and 11 Ves. 390.

Receiver accountable for failure of bank, by making deposits to his own use and credit.

And if the receiver make the remittances to his own credit and use, and not to a separate account for the trust, he will be chargeable with all losses accruing by the failure of the bank where he shall have deposited the money. *Wren v. Kistner*, 11 Ves. 377. This case is generally considered as over-ruling that of *Knight v. Plymouth*, *ubi supra*; but the cases are not incompatible. In *Knight v. Plymouth* it was said to be the receiver's business to receive the produce of the estate, and remit it to London. For that purpose he might either have remitted it in the manner he did (by inland bills), or have brought or sent it to town in cash, in both of which latter cases there was some hazard. It was true he might have come to town with it guarded; but, since the increase of trade and commerce, inland bills of exchange becoming more frequent, that had not been insisted on; and as the person, through whose hands he remitted it, was a person of reputation, and had usually conveyed it safe, the court thought he ought not to be answerable for a loss which was no way to be imputed to him, notwithstanding he was a receiver and had a salary, which it was urged implied an undertaking to indemnify, &c.: but the court held, that the receiver was not answerable for the failure of the bank where he had deposited the money with intent to draw for it when he went to London to settle his accounts. *Vide* 1 Hans. Rep. Camp. Keenan, 47. This case is recognised in *Barth v. Howell*, 3 Ves. 566, where the testator was directed by the will of their testator to pay debts with speed, and to lay out the residue in mortgages. It was held, not answerable for a loss by the insolvency of the testator's long negotiable securities deposited with him by the testator.

the receiver has made up his accounts, the court, upon petition of notice of the petition to the parties interested, and a the Master that the receiver has accounted, &c. will order him be discharged. *Prac. Reg. Ch.* 299. The receiver can only.

be discharged on petition : the court will not do it on farther directions ; and it must be a special application. *Gilbert v. Whitmarsh*, 24th February, 1818, 2 Madd. Ch. 240. Where a receiver was appointed by consent of all parties, incumbrancer, creditors, and tenant for life, and afterwards the creditors filed a bill, praying, amongst other things, that the said receiver might be discharged, alleging, that the incumbrancer had in fact no claim on the estate. The Lord Chancellor (Redesdale) held, that the receiver should not be discharged on the petition of the creditors only, against the consent of the incumbrancer, who was a party defendant ; and referred it to the Master to ascertain whether the allegation, that the incumbrancer was satisfied, was true. And if the incumbrancer had not been a party to the suit, it seemed to be the bearing of the Chancellor's opinion (though he made no decision on the point), that the incumbrancer might have filed a new bill, praying the court not to discharge the receiver, which bill would have been directed to be taken as filed at the same time as the former bill, in order that the whole case might have come on before the Master at once. *Largan v. Bowen*, 1 Sch. & Lef. 296. A receiver of rents of estates conveyed to secure an annuity, was discharged on acceptance of the price of the annuity with interest, deducting the past payments. *Davis v. Duke of Marlborough*, 2 Swan. 108 ; et vide *Langley v. Hawk*, 5 Madd. 46. If a tenant for life refuse to shew title-deeds, which are in his possession, so as to enable trustees under a settlement, who have power to mortgage, to make a mortgage, the court will appoint a receiver. *Brigstocke v. Mansel*, 3 Madd. 47 ; et vide ante, 300.

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XIV. It is the known mode of dealing between planters and persons lending them money, that the merchant in England on making the advances, secures by covenant the consignments of the produce of the plantations ; and the obligation to send the consignments to the mortgagee continues while the money lent is due. The grounds on which the mortgagee, lending money on a West India estate, is allowed the benefit of a covenant for the consignments, are twofold : first, because it furnishes him with a security for his debt ; and, secondly, because the commission, which he receives, is supposed only to be a fair compensation for his trouble. But it is questionable, whether a covenant to continue a mortgagee as consignee, after payment of the debt, is valid. *Bunbury v. Winter*, 1 Jac. & Walk. 255. A consignee of colonial property is the same as a receiver. *Bowersbank v. Colasseau*, 3 Ves. 164, recognized in *Attorney-General v. Day*, 2 Madd. Rep. 252. In one case a receiver, appointed of East India property, was allowed to remain in England, and act by agent. — *v. Lindsey*, 15 Ves. 91. This appears to be the usual way, as then the receiver is within the jurisdiction of the court, and he takes upon himself the appointment and responsibility of his own agent in the colony. See *Forrest v. Elwes*, 2 Meriv. 68. In a late case (*Forbes v. Hammond*, 1 Jac. & Walk. 88), where the consignee of a West India estate was dangerously ill, the court was petitioned to direct a reference to approve of a proper person to succeed him in case of his death. The Master of the Rolls thought it very doubtful whether a consignee could be thus appointed ; and observed, that the person approved of might cease to be a proper person before the time when his office was to commence ; but his Honor made the order, remarking, that the question must come before the court again upon

Receiver of colonial estates.

there was only a decree for a foreclosure, which did not affect the judgment creditors as to their right of redemption.

Notice.

purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase money, would have been equally affected with the judgment debt as the debtor himself. If he had afterwards paid the whole purchase money to the debtor, he would have still remained liable to the judgment creditor. In March, 1810, Mr. Eyre took a conveyance of the legal fee from the mortgagee and the debtor, and thereupon paid a very large proportion of the purchase money; and, by way of security for the rest, granted a legal term of years to the debtor. When in April, 1810, the plaintiff gave notice of his judgment to Mr. Eyre, the debtor had not only no legal freehold which the judgment would affect at law, but he had no equitable freehold interest which could be reached in equity. That equitable freehold which he possessed before March, 1810, was on the day of conveyance converted into a legal term. The plaintiff's notice to Mr. Eyre was nothing more than notice to the mortgagor, that a person to whom he had granted a legal term by way of mortgage was indebted on judgment; but a judgment is at law no lien upon a legal term, there must be execution; and where the interest of the debtor is legal, [merely, for instance, as mortgagee], a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure; and he has therefore well assigned it to the defendant. If there was no lien upon the term in the hands of the debtor, there can be no lien upon the term in the hands of his assignee. And his Honor dismissed the bill with costs. Mr. Sugden adds, in a note to the quotation of this decision, "now before the Lord Chancellor on appeal." *Sugd. Vend. & Pur.* 549. The further progress of this case has not yet transpired.

Whether trustees for sale may pay surplus to cestui que trust, with notice of judgments.

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In the above case an opinion of Mr. Serjeant Hill was cited, which, with the statement of facts, was to the following effect:—H. being seised in fee of certain estates, contracted to sell the same in lots, and after these contracts conveyed the same to trustees, in trust, to complete the purchases, to invest a sum in the 3 per cents., and to pay the residue to H. Subsequently to this trust deed, and before the trusts were carried into execution, H. confessed a judgment, notice of which was given to the trustees. The question was, whether the trustees would be safe in paying the money in question (consisting of the residue) to H., with respect to the creditor of whose judgment they had notice, and with respect to any judgment creditor of which they had no notice. "I think (remarked the learned Serjeant) the trustees will not be safe in paying the money in question to H. with respect to the creditor of whose judgment they have notice; but will be safe in respect to any creditor by judgment of which they have no notice. As to the judgment of which the trustees have notice, if the purchasers have not paid the purchase money, I think it is incumbent on them to see the judgment discharged; but if they had paid it before notice, they would not have been liable; because, by the contract and payment of the money, the vendor would have only been a trustee for the purchaser, and then the land would by the statute of frauds, 29 Car. 2. c. 3. s. 10, have been subject to the judgments of the purchaser.

Redemption of a mortgage may be had against the king (n) (H). *King may be redeemed.*

(n) *Pawlett v. Attorney-General*, Hardr. 465. [And the king may redeem, ante, 283.—Ed.]

who in that case would have been the *cestui que trust*; and therefore the land would not have been subject to the judgment entered against the vendor: and so was the opinion of the court, 1 Pr. Wms. 278, 9. But though to many purposes the estate agreed to be sold is from the time of the contract the estate of the purchaser, yet I think the vendor is not, before payment of the money, to be considered as a trustee within the above 10th section of the statute of frauds; for the estate continues *his* at law, and even in equity he has a right to detain it until payment of the purchase money; and therefore till that time I think it continues subject to the judgments of the vendor. And in the case 1 P. Wms. 278, (on which the opinion of the court was given) it is stated that the judgment was after payment of the purchase money by the person who contracted for the purchase, though before the conveyance to him; and the opinion is founded upon its being so stated. Therefore I think the judgment creditor hath a right to so much of the purchase money as is sufficient to satisfy his judgment; and the trustees, having notice of his right, ought to pay it if the money is in their hands. As to the judgments (if any) of which the trustees have no notice, if any such are prior to the deed of trust, they may be extended on the estate, notwithstanding the sale by the trustees; and though they should appear to be subsequent to the deed of trust, yet as the surplus of the estate is to be vested in the 3 per cents. for the benefit of the vendor, he has still an equitable interest in the land, which I think will be bound by the judgment; but if the trustees have no notice of judgments subsequent to the deed of trust, I think a court of equity will not make them pay the money over again, if they apply it according to the deed of trust; because I think equity in the case of a judgment creditor and a *bonâ fide* purchaser, or a trustee without notice, will not interpose on either side, but leave the law to take its course; and therefore as to such judgments (if any) as are subsequent to the deed of trust, and of which there is no notice, I think neither the purchasers nor the trustees are bound to take notice of them, nor are answerable for the application of the money to those who appear to them to be entitled to it. But though this is my opinion, yet I think it safest for search to be made for judgments; and if any others should appear, whether before or subsequent to the deed of trust, for the trustees to insist on H.'s consent to the payment of them, out of the surplus money, or else if the creditors by judgment insist upon a right to be paid, not to part with it without the directions of the court; and if the creditors and H. will not agree, nor file a bill against the trustees and proper parties, I think the trustees should file a bill of interpleader, stating the case, and pay the money into court; and pray by the bill that they may be allowed their costs thereout, and the residue to be disposed of as the court shall direct.

Vendor before payment of money not a trustee within the 10th sec. of statute of frauds.

As to judgments of which trustees have no notice.

Equity will interfere between judgment creditor and purchaser without notice.

GEO. HILL."

(H) That is, if a mortgagee be attainted of high treason, a bill may be filed against the Attorney-General on behalf of the crown to redeem. In such

Whether if mortgagee be

Mortgagor may redeem after release of equity of redemption, if such release

A mortgagor may redeem *even* after a release of the equity of redemption, if it appear, by circumstantial proofs, that it was made upon a secret trust and for his benefit. Thus, where the plaintiff and his father, in December, 1641, made a mort-

attainted of treason, mortgagor can redeem estate in hands of crown.

case the king cannot be compelled to convey, but an *amoveas manum* only lies. This, it is conceived, is the more correct statement of the law; for the case quoted by the learned author will not bear him out to the full extent of the proposition which he has deduced from it. In 1 Eq. Ca. Abr. 315, the case is reported with a *query*; and in Hardres no determination of the court is subjoined. The judges were conflicting in their opinions; but from the remarks of Sir Thomas Clarke, Lord Mansfield, and Lord Keeper Henley, in *Burgess v. Wheate*, 1 Bl. Rep. 145. S. C. 1 Eden's Rep. 205, it may be inferred that the demurrer was over-ruled. The mortgagee had by his will made a general bequest of his personal estate, and appointed an executor. The legal estate descended on his heir at law, who was attainted of high treason, whereupon the king seized the land; the executor also extended the land under a recognizance, which was a collateral security for the mortgage money. The mortgagor filed his bill against both, and made the Attorney-General a party. The Attorney-General demurred, and said the remedy taken was improper; it should have been by petition of *grace and favor*. The Lord Chief Baron Hale, on the first hearing of the cause, was of opinion, that although in natural justice equity of redemption lay against the king, yet he could not be *compelled* to reconvey; but that an *amoveas manum* only would lie in such case: and, on the second hearing, he said that the king being in actual possession, could not be removed in equity by an *amoveas manum* as he might at law. But Baron Atkins was strongly of opinion, that the party ought to be relieved against the king, because he was the fountain and head of justice and equity. Nothing more was heard of the case till it was cited in *Burgess v. Wheate*, ubi supra. Sir Thomas Clarke there observed, 1 Eden, 205, "Hale said equity of redemption lay against the crown; but as to the remedy or manner of suing it, that was a matter of high nature: but he held the executor and not the heir entitled to the mortgage money:" and per Lord Mansfield (ib. 235), "*Pawlett's case* seems settled on a true foundation, and the objection was in terms over-ruled." The Lord Keeper Henley went more fully into the case, and remarked (ib. 255), that it was said the king upon a legal estate should be liable to an equity of redemption. He did not know that it had ever been so determined. Lord Hale thought the king should, because it was an ancient right which the party was entitled to in equity. Baron Atkins thought the same, because he saw the same equity against the crown as against a common person. Yet, said the Lord Keeper, there is in that case (*Pawlett v. Attorney-General*) a recognition of the equity without any declaration of the remedy. Whether this remedy has since been settled in the Exchequer, where alone it could be settled, he really did not know, but he hoped it was so settled; for he saw a great deal of equity to support the opinion of Hale and Atkins.—No adjudication in the Exchequer, as alluded to by the Lord Keeper, can be found; and thus the point stands at present—the equity recognized, and the remedy denied. The case of an alien mortgagee affords no analogy; for in an instance

gage to the father of the defendants, the plaintiff's suit was to have redemption. The defendants set up a release made by the plaintiff in 1646, of all his equity of redemption, and a decree made by Lord Chancellor Hyde, in this cause, in 1663, which decree was penned as if made by consent. This decree being signed and inrolled, and the plaintiff not being able to perform the same, he could not have a bill of review, nor could he have been relieved by such bill, if it had been brought, the release barring all his pretensions; and that being upon a secret trust, he could not prove the trust positively, the witnesses being dead; wherefore he was not relievable either in law or equity (o). The plaintiff petitioned the House of Lords for relief against the decree and release. The proofs offered in evidence of the trusts were circumstantial, and not direct positive proofs. They went principally to shew, that the debts due from the plaintiff and his father were small in comparison with the value of the estate at the time of making the release. These proofs being read, and it appearing clearly thereby, that the value of the lands was much greater than to make a satisfaction for the debt for which it was released, it was determined to be a trust; and the cause was referred back to the court to be proceeded upon, as in the case of an equitable mortgage, which their Lordships adjudged it to be. Afterwards the cause was reheard in court, when a decree

be on a secret trust for his benefit.

(o) *Morlay v. Elways et al.* 1 Ch. Ca. 107. Trin. 1668.

of that kind the legal estate vested in the king, on principles quite different from those which govern the forfeiture in the case of an attainted mortgagee. That the king might redeem a mortgage which devolves to him through the attainder of the mortgagor, see ante, 283.

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continued.

It is also in place to remark here, that all bodies politic or corporate, whether aggregate or sole, as well as other incorporate persons, will be bound by the equity of redemption, if they either become mortgagees or stand in his place. The authorities for this position are, it is true, rather oblique; but there can be little doubt of their support and application. The numerous cases on charitable bequests and dispositions prove, that corporations may be bound by a trust; for which, see *Lydiatt v. Foach*, 2 Vern. 412. *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 47. S. C. 4 Bro. C. C. 167. et vide 1 Ves. & Bea. 246. 2 ib. 138; and other cases of that class. And if a corporation may be bound by a trust, it is an easy inference to conclude, that it will be equally subject to an equity of redemption; and such is now the uniform opinion of the profession.

Corporation bound by equity of redemption.

was made for the defendants to come to an account, and the plaintiff to be admitted to the redemption of his estate (i).

*Contribution by
tenant for life.*

And if there be tenant for life, with remainder or reversion in fee of an equity of redemption, they shall contribute proportionably what is due on the mortgage (k).

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*Devisee for life
may redeem and
hold over.*

So, a devisee of an estate for life, in an equity of redemption, may redeem and hold over until those in remainder contribute (l).

*Viner's observa-
tion on Morley
v. Elways.*

(I) From this case it has been deduced that equity "will consider all acquisitions of interest by the mortgagee in the fund mortgaged, as subject to the covenant for redemption." See the Author's index, voce "Courts of Equity," 4th edit. This however may be considered as disposed of by n. (N), p. 122, ante; and to the cases there cited, add *Wrixon v. Cotter*, 1 Ridgw. P. C. 295, as a confirmatory authority for the propositions there adduced. The principal case indeed of *Morley v. Elways*, is said to have been reversed in parliament, by Viner, in his Abridgment, vol. xv. p. 472, pl. 2.

*Tenant for life,
mortgage by
him and re-
mainder-man.*

(K) So it was held in *Saville v. Saville*, 2 Atk. 463. S. C. Select Ca. in Ch. 33, that the interest of incumbrances should be kept down by the tenant for life, but that the principal money due on any such incumbrance should be borne by the whole estate. And in *Howard v. Attorney-General*, 2 Mod. 174, it was agreed by the court, that if there be tenant for life, with remainder in fee, and they join in a deed purporting to be an absolute conveyance, if it be proved to be but a mortgage, the tenant for life shall have his estate for life again, paying *pro rata* according to his estate; and in the same case it was agreed that a similar law would prevail, as between a tenant in dower and the heir at law. A dowress and jointress are in this respect like other tenants for life, and must contribute proportionably.

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*Remainder-man
may redeem.*

(L) It may be also proper to state here, to keep up the thread of observation as to the ability of persons to redeem, that a remainder-man may redeem while the tenant for life is living. In the case of *Gifford v. Hort*, 1 Sch. & Lef. 407, n. (a), the Barons of the Irish Exchequer held, that the equity of redemption was barred by length of time; and the plaintiff being only remainder-man during that period made no difference: that he might in that capacity have proceeded to enforce a redemption, or to have a receiver put on the tenant for life. Et vide ante, 300, infra, 369. So a remote remainder-man of an equity of redemption may file a bill to redeem, either before or immediately after his title vests in possession; and he has been held not too late to set aside a title founded on a decree made upwards of twenty years before, which was fraudulent and void as against him and the other persons claiming remainders. *Blake v. Foster*, 2 Ball & Bea. 387. But a remainder-man, who gets possession by redeeming or taking an assignment of a mortgage, does not enter by virtue of his own title, but by that of the mortgagee. The distinction between the two species of possession must be

And in such a case the general rule is, that the estate of the tenant for life in the premises shall be rated at one-third, and that of the remainder-man or reversioner in fee at two-thirds of what is due for principal and interest (p) (M). *Tenant for life to pay one-third, and remainder-man two-thirds.*

(p) *Rowell v. Walley*, 1 Rep. Ch. Amb. 88. Et vide *Brend v. Brend*, 221. *Ballet v. Spranger*, Pre. Ch. 62. 1 Vern. 213. *James v. Hailes*, Pre. *Verney v. Verney*, 1 Ves. 428. [S. C. Ch. 44.—Ed.]

evident on the slightest reflection. Possession, in the one case, is as owner; in the other, as mortgagee. Now nothing can be more hazardous or inconvenient than the possession of a mortgagee; the manner in which he is called on to account being most rigorous and severe. 2 Ball & Bea. 403. On the point of length of time this case seems to be indecisive, as judgment was deferred till after that in *Clinton v. Cholmondeley* should have been pronounced, and the effect of that decision on the Irish case is not added. Ibid. 557.

So a reversioner may redeem. *Aynsley v. Reed*, 1 Dick. 249.

(M) This rule as to the tenant for life paying a gross sum is now exploded as unreasonable (*Penrhyn v. Hughes*, 5 Ves. 107. *White v. White*, 4 Ves. 33), and the following more equitable one adopted in its stead, viz. *that the tenant for life shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the mortgage debt, and the consequent cessation of annual payments of interest during his life (which of course will depend much on his age, and the computation of the value of his life). And a reference will be directed to the Master to inquire what proportion of the capital he ought to pay.* *Allan v. Backhouse*, 2 Ves. & Bea. 70; see also *Nightingale v. Lawson*, 1 Bro. C. C. 440. *Shrewsbury v. Shrewsbury*, 1 Ves. jun. 233, 234. *Jennings v. Looks*, 2 P. Wms. 278. *Jones v. Selby*, Pre. Ch. 289. *Lloyd v. Jones*, 9 Ves. 37. *Montford v. Cadogan*, 17 Ves. 485, note to p. 314, post, and Chap. XIX. post, as to the payment of interest by tenant for life. This subject was much discussed at the Rolls, in the case of *White v. White*, 4 Ves. 24, and 5 Ves. 554, and afterwards before the Chancellor, on appeal, when the decision of the Master of the Rolls was as to the main points affirmed. 9 Ves. 554. Lord Alvanley, M. R. is reported to have said, that the tenant for life ought to pay nothing but the interest. The present Lord Chancellor, however, when that case came on upon appeal, disapproved of that doctrine, on the ground of the possible inequality; and stated the rule as an *obiter dictum* to be, that in general cases, where the tenant for life is bound to pay any thing beyond the interest, he is bound to pay in proportion to the benefit he *de facto* takes under the transaction; and that the remainder-man ought also to pay, with reference to his proportion of the benefit. But his Lordship would not finally decide the question then, it being in that case unnecessary to give a definitive opinion on the subject. The rule, however, as above stated, was subsequently acknowledged and acted on, in the case of *Allan v. Backhouse*, ubi supra, and such must now be taken to be the standing doctrine of the court. The same rule prevails as to the apportionment of fines, fees, &c. paid on the renewal of

Contribution by tenant for life.

*Tenant for life
compellable to
contribute.*

And if the mortgage-money is payable on a contingency not arrived he in remainder or reversion may exhibit his bill *quia timet* (N) against the tenant for life, and the tenant for life shall be decreed to contribute (q).

(q) *Hayes v. Hayes*, 1 Ch. Ca. 223. [S. C. 1 Eq. Ca. Abr. 78, pl. 2. 1 Vern. 69.—Ed.]

leases by tenant for life; for which see *White v. White*, 4 Ves. 33. 2 Foub. Tr. Eq. 386, 5th edit. See also 1 Ibid. 386, and 9 Ves. 554.

*No contribution
to mortgage by
person entitled
to portion out
of equity of re-
demption.*

It may also be proper to add in this place, that if an estate in mortgage be settled on A. for life, with remainder to trustees for a term of years, for raising 4000*l.*, or other sum, for the portions of A.'s younger children, with remainder to his first and other sons in tail male, with remainders over, and there be one son B., and two daughters, C. and D., and the settlor proving to be greatly indebted at the time he made the settlement, an act of parliament be procured during the children's minority, whereby the estates are vested in trustees in fee, discharged from the uses of the settlement, upon trust, to raise by mortgage or sale, the expences of the act and of the trusts, and afterwards certain portions affecting the estate prior to the settlement, and then sufficient sums to pay the private debts of A. to a large amount, and afterwards to convey the unsold estates, and the equity of redemption of those which should be mortgages *to the uses of the settlement*; then, if the trustees under this act mortgage the estates in fee, it is worth noticing, that on payment of that mortgage by the owner of the estate, he will not be entitled to call on C. and D. for a proportionable contribution towards such mortgage, nor for any portion of the expences incurred in obtaining and executing the act of parliament; per Sir Thomas Plumer, M. R. in *Hansard v. Kemys*, 2 Jno. Wils. 123, who observed, that the object of the legislature was apparent from the preamble to the act under consideration. The mortgaged estates were to be subject, in the first place, to the payment of the money advanced in discharge of the debts, and in the next place to what should be due on the settlement. The settlement was to be untouched; for though it was directed that the estates should be discharged from it, they were to be immediately made again liable to its provisions. It was impossible, therefore, to consider that the settlement was intended to be abrogated. Et vide the case of *Hansard v. Kemys*, as to other points, Coop. Rep. 125.

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*Bill of quia
timet lies to
prevent mis-
chief.*

(N) When a person is apprehensive of being subjected to a future inconvenience, probable and even possible to happen, or be occasioned by the neglect, inadvertence, or culpability of another, a bill of this kind may be exhibited to quiet the parties' apprehensions of future inconvenience, by removing the causes which may lead to it. Hinde's Prac. 128. Therefore, in the case in the text, where A. being seised of lands in fee, granted a rent charge issuing thereout, and afterwards devised the lands to B. for life, with remainder to C. in fee, and died; it was held, that such a bill was proper to compel B. to pay the arrears, for fear all should fall on C. the reversioner, although it was urged that this was a remote possibility.

And (r) if the tenant for life of the equity of redemption pays off the mortgage, and has the term assigned over in trust for himself, and makes improvements, and dies, and afterwards the remainder-man or reversioner comes to redeem, the representatives of tenant for life shall have the allowance of two-thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life (o); and no interest shall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the interest during his estate.

Tenant for life to be reimbursed two-thirds of improvements, but not allowed interest for what he has expended in redeeming.

(r) *Newling v. Abbot*, 1 Vin. Abr. 186. S. C. 2 Eq. Ca. Abr. 596, pl. 11.

(O) In one case where the time of redemption was fixed for a distant period, and the mortgagor was allowed to redeem before the day appointed for the payment of the money, the mortgagee (who was in possession) was allowed in full for all his lasting improvements. 1 Raithby's edit. of Vernon, 184, n. 1. The contrary, however, appears to have been held in *Clarke v. Abbot*, Barn. 457. 15 Vin. 474. The old rule would now, perhaps, be considered obsolete, and the tenant for life, or mortgagee, allowed in full for all reasonable and permanent improvements with interest, from the time he made the same. Vide decree in *Webb v. Rorke*, 2 Sch. & Lef. 661. See also *Godfrey v. Watson*, 3 Atk. 517, and *Walley v. Walley*, 1 Vern. 487: et infra, 956.

Sed secus of a committee of a lunatic, expending money on improvements without an order. *Foster v. Merchant*, 1 Vern. 262.

According to Vinnius, if a creditor had been at any expence which was not absolutely necessary for the preservation of the pledge, but which had augmented the value of it, or improved the land, he was to be paid for these according to circumstances. Thus, if the mortgagor himself had begun the improvements, he would have less reason to complain of them, or if the mortgagee had reaped from the improvements fruits to a greater value than the interest of the money he had laid out, he would be entitled to a smaller sum for his reimbursement. So, according to other circumstances, it would be necessary to make such a medium as might not favor either the severity or hardship of the mortgagee, or the unreasonable nicety of the mortgagor. See Vin. lib. 38, *de rei vind.* et Inst. lib. 25, *de pign. act.* But if a mortgagee had lain out money for preserving or repairing the property mortgaged, as for example, to secure a piece of ground against the current of a river, to prevent the fall of a house, or to rebuild it after its fall, he would have been entitled to these expences in full; for he had preserved the thing in being for the common interest, both of the proprietor and creditor; and it was his own to the value of what he had laid out upon it, *ibid.* lib. 25, *de reb. cred.* lib. 24. s. 1, and lib. 26, *de reb. auct.*

Of allowance for improvements by civil law.

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Tenant for life redeemed and died. Bill by remainder-man to redeem his executor on paying two-thirds only, dismissed.

A distinction is made in computing the value of the life, where the application is during the life of tenant for life, and where it is after his death (s). For where lands in mortgage were devised to A. for life, remainder to B. and his heirs, A. entered, brought in the mortgage, took an assignment in trustees names, and died. B., the remainder-man, preferred his bill against the defendant, the representative of A., to redeem. It was insisted, by B.'s counsel, that he ought to pay but two-thirds of what was due on the mortgage, and that the other third ought to be allowed by the defendant, by reason the tenant for life enjoyed the profits during his life (p). But the court said, had the application for redemption been in the life-time of the tenant for life, that then he should have been allowed a proportion of the money, in proportion to the value of the respective estates of the tenant for life and the remainder-man; but he being now dead, and having enjoyed the estate but one year only, the defendant must make an allowance *only* for the time that A. enjoyed the estate (q).

Tenant for life to pay two-fifths, and tenant in tail three-fifths.

In the case of *James v. Hailes* (t), it is laid down that, if an estate in mortgage be settled on A. for life, and then on B. in tail or in fee, the tenant for life shall bear two-fifths of the principal and interest, and the remainder-man three-fifths (r).

(s) *Clyat v. Batteson*, 1 Vern. 404. (t) *James v. Hailes*, Pre. Ch. 44.

(P) This was balanced by the loss of interest of money paid for redemption.

Present rule of contribution.

(Q) This point does not appear in the Register Book (Reg. lib. 1685, A. fo. 759). It does, however, very much assimilate to the rule now adopted in courts of equity, and it is, perhaps, a more equal and reasonable rule than the old one of one and two-thirds. That the tenant for life should, in all cases, pay one-third of the mortgage money in a gross sum, is beyond his proportion of the benefit, and that he should only pay a sum equivalent to the interest which may accrue during his life, is perhaps too little, and therefore the rule at present acted on is, that he shall contribute in proportion to the advantage he may derive by an exoneration of his estate for life from the burthen of the mortgage money; and it is referred to the Master to ascertain the amount of such contribution. See ante, p. 312, note (M).

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Rule of two and three fifths never allowed.

(R) The same doctrine prevailed in *Rives v. Rives*, Pre. Ch. 21. But in an anonymous case in 1 Pr. Wms. 650, the reporter states, that he mentioned to the court that the life estate (especially in the case where the tenant for life

But where he who is possessed of the equity of redemption hath such an interest in the estate, as he can *secure* the money laid out by him to redeem upon, the remainder-man shall pay him, or his representatives, *all* he hath advanced.

Particular tenant paying off incumbrance, and taking assignment, allowed whole money advanced.

As (u) where a *tenant in tail* of a mortgaged estate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the estate by mortgage term for years, but neglected to have an assignment of the term to himself, and afterwards devised the same lands; and the plaintiffs, the remainder-men under the will, claimed the estate as not barred, discharged of the incumbrance. The Lord Chancellor held, that there being a term for years in the mortgagee, which stood in point of law as it did before, no assignment in law being made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance must be upon equitable grounds. That, so far as it appeared, tenant in tail paid it off with his own money; that he might have taken an assignment of the term, either in trust, to attend the inheritance, which would have ended this question, or in trust for himself, his executors, or administrators, which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate, and those entitled thereto; or, that he might have called for an assignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any of these, clearly proved, that he took himself to have had the absolute ownership and disposal of it. And the court could not decree to persons claiming this, in contradiction to his apprehension and intent, a conveyance of

Incumbrance paid by tenant in tail, thinking himself owner of fee, not an exoneration (s).

(u) *Kirkham v. Smith*, 1 Ves. 258. [S. C. 260, and in Amb. 518.—Ed.]

had the remainder in fee) might be valued at two fifths, which had been done in some cases, yet the court said, how equitable soever that might be, it was not the practice, for which reason it would be dangerous, and create uncertainty to go out of the rule; and the Register said he had never known a life valued at more than one third. See last note for the present rule.

(s) The court conceiving that he had not that intention, and that it was from misconception that he did not take an assignment of the debt, per Lord Eldon in *Lloyd v. Jones*, 9 Ves. 62.

the inheritance, and likewise of this term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity must do equity*; and the plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail in discharge of the mortgage (T).

Tenant in tail of two estates sells one, other must bear whole charge.

(T) This case of *Kirkham v. Smith* was cited and recognized by Lord Eldon, in *Lloyd v. Jones*, 9 Ves. 37, and by Sir T. Plumer, M. R. in *Pitt v. Pitt*, 1 Turn. 183. In the case of *Lloyd v. Jones*, a tenant in tail being possessed of two estates, subject to a mortgage affecting both, sold one of them in fee, and conveyed it to the purchaser by indentures of lease and release. The tenant in tail dying, a question arose, whether the remainder-man of the estate not sold, could compel a contribution from the purchaser of the other estate, as to his proportion of the charge, according to the value of the respective estates, and it was held, that the purchaser (supposing the conveyances valid, of which there was some question) was not obliged to contribute in exoneration of the other estate remaining in settlement, because the tenant in tail could have barred the remainder-man, who claimed the appropriation of the charge.

Incumbrances paid off by tenant for life, and tenant in tail, whether in exoneration?

On the authority of the case of *Kirkham v. Smith*, Lord Thurlow held, that when a tenant in tail paid off an incumbrance, it was only inference, and not *juris positivi*, that he meant to exonerate the estate, and evidence might be produced to prove the contrary, and that the rule of law, when a tenant for life paid off the incumbrance, was, that he should be a creditor for the money, but that when a tenant in tail discharged it, such payment should operate in exoneration of the estate of which he might have made himself absolute owner. *Jones v. Morgan*, 1 Bro. C. C. 218. In like manner it was held, in *St. Paul v. Dudley*, 15 Ves. 167, that if a tenant for life, paying off an incumbrance, merged the security by taking an assignment to himself (thus connecting it with the legal estate of inheritance of which his life estate was a portion) *prima facie* the charge would be extinguished and the estate exonerated; and that in every case where a tenant in tail paid off an incumbrance (since he represented the inheritance) the presumption was, that whether he took an assignment of the inheritance or not, the debt was gone and the estate discharged. But it was further held, that in either of these cases, evidence of an intention to continue the charge would be admissible to rebut the presumption.

The cases on this subject are, *Amesbury v. Brown*, 1 Ves. 477. *S. C.* post, 1002. *Jones v. Morgan*, 1 Bro. C. C. 218. *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 120. *Sergisson v. Sealey*, 2 Atk. 416. *Wyndham v. Egremont*, Amb. 753. *Ware v. Polhill*, 11 Ves. 257. *St. Paul v. Dudley*, 15 Ves. 167. *Rodington v. Rodington*, 1 Ball. & Bea. 140. *Pitt v. Pitt*, 1 Turn. 183. *Buckingham v. Hobart*, 3 Swanst. 186. And the result of them appears to be:—

1st. By tenant for life, and persons partially interested.

1st. That if a tenant for life (although with remote remainders in tail or in fee, Amb. 753), or even a tenant in tail who has an express condition of non-alienation annexed to his estate by act of parliament (such tenant in tail

being in equity considered as tenant for life, 3 Bro. C. C. 120. 3 Swanst. 200), or an infant tenant in tail (who cannot alien during minority), pays off a mortgage, or other incumbrance charged on the inheritance, and takes no further notice of it by assignment or otherwise, then *prima facie* the incumbrance will continue a charge on the land, for the benefit of the person so paying it off, and his representatives, with the qualification of having no interest during life, in the same manner as it would have continued a charge in the hands of the original incumbrancer. And it is observable, that where a person entitled partially to land is also entitled to a sum of money charged upon the inheritance, it does not necessarily merge.—This rule arises from the extreme scantiness of the estate of the tenant for life, and other persons named, who cannot be presumed to intend a bounty to the persons in remainder, they having by far the largest portion of the property. This indeed would be discharging the estate of another person of a heavy burthen, without any consideration or tie of affection. The *onus* lies on those in remainder or reversion, to shew an intention in the persons purchasing the incumbrance to exonerate the estate; and it seems the not taking an assignment of the debt from the creditors will not be evidence to that effect.

2dly. If a tenant in tail pays off an incumbrance on the estate, he is considered *prima facie* to have intended an exoneration; for as he might acquire the absolute ownership by a recovery, a presumption arises that his intention was not to keep alive the charge, and therefore the *onus* devolves on his representatives, to prove that he did not mean to discharge the estate of its burthen. In default of that proof, it will be presumed that the tenant in tail intended to exonerate the estate, principally for the reason that the issue in tail being necessarily part of his family, and he having the remainder and reversion completely under his controul (3 Pr. Wms. 235), he must be considered in effect the absolute owner, and as he cannot be a trustee for himself, the purchase of the incumbrance is presumed to be made for his own benefit. And here note the difference between the payment of a charge due on the estate by the tenant in tail, which is a voluntary act, and the devolution of the estate to him when he already has the charge. In the former case, the charge will be extinguished; in the latter, it will not. The distinctions as to this point, according to *Chandos v. Talbot*, 2 Pr. Wms. 605, are these:—If 1000*l.* be charged on a real estate, which estate itself comes to the person entitled to the money, if in fee the charge will be merged, but if the charge be secured by a term, or other legal estate in a third person, there the charge will not be merged, nor will it, if the estate which comes to the person entitled to the money be only an estate tail.

2d. By tenant
in tail.
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These are mere general rules of presumption or primary inference, and may be rebutted by circumstantial evidence to the contrary. Where, therefore, a tenant in tail paid off a charge, but took no assignment of it, under an impression that he was tenant in fee, the court held that the charge should not be extinguished, because it was to be inferred from the circumstances, that if the party had been aware of his title as tenant in tail, he would have taken care to have maintained the incumbrance. One principal circumstance was, that this incumbrance was taken off the estate in question, and charged on other estates, so that in fact the incumbrance was not really extinguished. *Buckingham v. Hobart*, 3 Swanst. 186.—In cases involving these or similar

Practice.

Daughter, having redeemed, shall hold against posthumous son (U).

A daughter, being heiress at law, redeeming, shall hold the land against a posthumous son.

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Thus (x) where a man mortgaged upon condition, that if he or his heirs repaid 100%. at such a day he should re-enter ; he died, leaving issue a daughter only, his wife being *previement ensient* with a son ; the daughter and heir, at the day, paid the 100%. and afterwards the son was born ; and whether the son should enter upon the sister, or she should retain it for ever, was the question ? And it was held by Hyde, Chief Justice ; Walter, Chief Baron ; Denham, Hutton, Whitlock, Harvie, Yelverton, and Croke, that the sister should retain it against the son, born after the performance of the condition ; for inasmuch as she paid the money (*and if she had not paid it, the land had been lost*), if she could not retain the land against the son, she had no remedy for the money, and by payment thereof she had gained the land, and was in as a purchaser, although she were entitled thereto by the condition, and as heir, and she should retain it, as she should the perquisite of a villain, and as land gained by her vigilancy ; for

(x) *Kerton's case*, Cro. Car. 87.

questions, the prudent course is, to adjust the rights of those who are to succeed to the property, by an instrument which shall fully and clearly express the intention. A form of this species of deed will be added in the Third Volume.

Kerton's case reviewed.

(U) The case cited by the learned author goes to prove that the daughter should retain the lands for ever against the son. But the judges were divided in opinion, and consequently nothing final can be collected from the case. The circumstance of its being a legal redemption by payment of the money at the day, very much favors the opinion that the daughter should hold *absolutely against the son* ; and at law it is presumed such must be the determination of the court, for the daughter by her vigilance prevented the estate from being forfeited. She was therefore a purchaser, and it is conceived that a court of equity would not interfere and compel the daughter to be redeemed, but leave them to their legal rights, for it is not the case of an equitable, but of a legal redemption. If the day had passed, and the daughter had redeemed voluntarily, or to prevent a foreclosure, then it would have been altogether a case of equitable jurisdiction, and the probabilities are, that a court of equity would, in that case, permit the daughter to hold over only for the money which she had expended in redeeming the estate. The learned author has however, taken a different view of the case, in p. 318, post, to which reference is made. *Young v. Radford*, Hob. 3. 10 Vin. Abr. 231.

otherwise it should be lost to both, and she should lose both land and money, therefore the law willed that she should retain the land. But Richardson, Chief Justice of the Common Bench, and Dodderidge, held strongly the contrary, because she had it as heir, and then the nearer heir being born, should defeat her title; and it was in her *voluntary* act to pay the money, which she might well have omitted, and she paid it of her own head, and at her own peril; Jones and Trevor, puisne barons, doubted thereof, and would not deliver any opinion, but rather inclined that the son should have it.

The degree of pressure under which money so circumstanced should be paid, would, it is presumed, at this period, decide to whom the equity of redemption should belong. If a daughter so predicamented should pay money due upon mortgage to prevent an actual foreclosure, and, to save the inheritance, should satisfy the condition on the point of being forfeited in equity as well as at law; there seems great reason that a son born after should not divest it, because if the daughter had not performed the condition, the land had been utterly lost, and *qui sentit onus, sentire debet et commodum*. But if a daughter so circumstanced should officiously pay off the mortgage in order to vest the estate in herself, it should seem the equity would be against her, because the condition being saved in equity, notwithstanding the forfeiture at law, would descend to the after-born son, and the act of the daughter being voluntary, would not fall within the maxim alluded to. She therefore could only be considered as a trustee for the heir (x).

Voluntary redemption, and redemption to prevent foreclosure, distinguished.

An equity of redemption of a mortgage in fee is not assets at law, because the estate is forfeited; and if a specialty creditor bring an action against the heir, the heir may plead

Equity of redemption on mortgage in fee, equitable and not legal assets (y).

(X) See the preceding note, for the Editor's observations on this case.

(Y) Assets are, 1st. Either real or personal; and, 2ndly, Either legal or equitable. *Real* assets are such hereditaments as are chargeable to creditors in the hands of the heir at law. Thus, lands descended are real assets for the satisfaction of specialty debts, 3 Wooddes. Lect. 485; and an advowson descended is real assets, *Robinson v. Tange*, 3 Pr. Wms. 401. *Personal* assets

Assets real and personal, legal and equitable, distinguished.

riens per discent; but the heir having a right in equity, *that* [right] is in equity liable to satisfy debts (z).

(z) *Solley v. Gower*, 2 Vern. 61. before the statute of fraudulent devises? [If it were, a difference on *Plackett v. Kirk*, 1 Vern. 411. 2 Atk. 294. 2 Vern. 54. Contra, *Bennet v. Box*, cited 1 Vern. 410. *Quare*, if —Ed.]

are such goods and chattels as are chargeable to creditors and legatees, in the hands of the executors, and consist of all the personal estate of the testator when converted into money. 2 Bla. Com. 510. Assets are 2dly, either legal or equitable. Legal assets are such as constitute a fund for the payment of debts according to their legal priority, giving preference conformably to a course of administration; and it is not a sufficient mark of distinction to say that they are recoverable in a court of law only, for they may be sued for and recovered in a court of equity also, when the nature of the assets calls for that mode of procedure. Equitable assets are such as can be reached only by the aid of a court of equity, and are divisible *pari passu*, that is, among all the creditors equally. Every thing may be considered as equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to his debts generally. 2 Fonb. Tr. Eq. 402, 5th edit. Therefore a general charge of debts, comprised in the terms frequently found in wills, as “in the first place, I will and desire that all my just debts, funeral and testamentary expences, &c. be paid and discharged,” will convert the whole property of the testator, whether it consist of equities of redemption, or other real estate, into equitable assets, for the payment of debts generally, and that although the equity of redemption or other real estate, be afterwards devised to the heir in fee, or the descent be not broken. *Shiphard v. Lutwidge*, 8 Ves. 26. *Pope v. Gwyn*, ib. 28. *Burt v. Thomas*, ib. 30. The equity of redemption on a mortgage in fee must, in all cases, be equitable assets, particularly if the mortgagor devise it in trust to sell to pay debts. In a case where A. made a mortgage in fee to B. upon trusts for sale, and then died, devising the equity of redemption to trustees in trust to be sold for payment of his debts, and made the trustees executors, and after A.’s death, the mortgagee sold and paid himself, leaving a surplus of about 500*l.* a question arose whether this sum was equitable assets. Per Bayley, J. it is equitable assets for two reasons; first, because the subject-matter of the devise was equitable property at the death of the testator; and secondly, because this was a devise in trust to pay debts; and Holroyd, J. concurring, observed, that whatever might have been ruled in the old cases in Vernon, it was then clearly settled, that a devise to trustees (who were also made executors), in trust to sell, did not constitute legal assets. *Clay v. Willis*, 1 Barn. & Cress. 364. Lord Eldon has remarked, that a mere charge of debts is a declaration of intention, on which a court of equity will fasten, and by virtue of which it will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts. *Baily v. Ekins*, 7 Ves. 323. But to exempt the personal estate from the payment of debts, there must be declaration plain, or a manifest intention to do so.

And if the heir alien, or releases his equity of redemption, to prevent the creditors from having a satisfaction for their *If equity of redemption be aliened, money may in equity*

Waring v. Ward, 7 Ves. 332. The principal distinction between legal and equitable assets, consists in the mode of distribution. If they are distributable according to the rules prescribed in courts of law for the administration of the estates of intestates, they are said to be legal assets, and if according to the rules which govern courts of equity, equitable assets. Courts of law adopt rules of priority, giving preference of one class of creditors to another, for which see post, 324, n. (E). But courts of equity favor equality, and therefore divide the assets amongst the creditors equally. *Anon.* 2 Vern. 133. *Challis v. Casborn*, Pr. Ch. 408. *Chambers v. Harvest*, Mose. 123; et vide ib. 328. *Lewin v. Oakley*, 2 Atk. 50. *Batson v. Lindgreen*, 2 Bro. C. C. 94.

It may be material to observe here, that a distinction exists as to equitable assets, between the cases where a testator devises his real estates (and amongst them his equities of redemption), for payment of debts generally, or what is equivalent thereto, makes a charge on all his real property for that purpose, and where he dies intestate, leaving his estates and equities of redemption to descend to his heir at law. In the former case we have seen, that the estates will be assets in equity for the payment of debts generally, and consequently, whether the debts are by specialty or by simple contract, it will not make any difference. In the latter case, *descended estates* and equities of redemption will not be assets to pay *simple contract creditors* in any event, and they will be assets to pay *specialty creditors* only in the event of the personal estate, and other funds appropriated for the payment of the debts, proving deficient. (For the rules respecting the administration of assets in law and equity, and for the mode of affecting assets, reference is made to p. 324, post, note (E), where those subjects are more fully enlarged on). In *Baden v. Pembroke*, 15 Vin. Abr. 460. S. C. 2 Vern. 52. 123, it was argued, that if A. mortgage estates to B. and then depart this life intestate, leaving C. his heir at law, and several bond creditors, and the executor pays off the mortgage to B. which will enure to the benefit of C. the heir, the bond creditor cannot afterwards, by any means, affecting the estate in the hands of the heir, for, by the payment of the debt, the lands are discharged of the mortgage, and immediately become vested in the heir; but it was said to be otherwise where a leasehold estate is mortgaged, for the equity of redemption of a term for years comes to the executor, and in such case a bond creditor should be let in, because if the term itself should be re-conveyed, it would be assets in his hands. The first member of this proposition cannot surely be law; for the mortgage on the descended estate might not amount to half the value of the lands, and then the heir would take the estate, and leave the bond creditor to perhaps a deficient personal fund, while in fact there are real assets descending to the heir. The descended estate, to the value beyond the sum paid for the redemption, must at all events be equitable assets for payment of the specialty creditor; and if the whole equity of redemption were assets in equity (which we shall immediately see it is), then the bond creditor will be entitled to the

Assets distinguished as to devised and descended estates, and as to specialty and S. C. creditors.

be followed in
hands of heir
or executor.

debts, the Court of Chancery will follow the money in the hands of the heir or executor.

whole estate as a real asset for the payment of his debt, and this for a good reason, because the sum paid for redemption came out of a fund to which, as it is termed, he was naturally entitled.

Equities of re-
demption equit-
able assets.

Equities of redemption, whether on a mortgage in fee, or on a mortgage for years, or on a mortgage of a leasehold estate for the whole term, are as a general rule to be referred to the class of equitable assets. *Ryall v. Ryall*, 1 Atk. 60. *Solley v. Gower*, 2 Vern. 61. *Plunket v. Penon*, 2 Atk. 293, 294.

It was in one case contended, where the plaintiff had an assignment of the lease in his possession, which had been deposited with him by the intestate, upon which he had a lien, that so long as the lease remained in the hands of the plaintiff undisposed of, the value of it could not be considered as assets in the hands of the defendant the administratrix; but per Abbott, C. J. she might have redeemed the lease, and then have sold it. The produce then would have been clearly assets, and her not having redeemed the lease was her own fault, and prevented her from pleading *plene administravit*. *Vincent v. Sharp*, 2 Stark. 508.

But the reversion expectant on a mortgage for years, or on a mortgage of a leasehold estate for less than the whole term, is to be ranked under the class of legal assets (post, 322, 3,) with which a court of equity has nothing to do. Previously to the statute of frauds, all trust estates were equitable assets. By that statute, as we have already seen, ante, 256, n. (K.) trust estates in fee simple were rendered liable to an execution at law. A trust estate of inheritance therefore became legal assets; and by analogy it was held, that an equity of redemption was also legal assets under the statute of frauds, 2 Freem. 115, pl. 130; but this determination does not appear to have been acted on; and Lord Hardwicke has expressly over-ruled it, by deciding, that an equity of redemption on a mortgage of freehold property is equitable assets for the payment of specialty creditors: and that on an action at law by a special creditor against the heir at law, the heir may plead *rien per descent* (i. e.), that he has not any legal assets by descent. *Plunket v. Penon*, 2 Atk. 290. So in *Sir Charles Cox's case*, 3 P. Wms. 342. S. C. Amb. 508, (see vide what is said of this case, post, 322, n. (A), it was held, that an equity of redemption on a mortgage of a leasehold estate was equitable assets, and liable to all the debts equally, whether by specialty or simple contract, and an equity of redemption is now uniformly taken in practice as equitable assets. Et vide *Wilson v. Fielding*, 2 Vern. 764.

Except as to
judgment cre-
ditor, who may
redeem.

As to judgment creditors:—In consequence of the judgment creating a general lien on the equity of redemption, the equity of redemption is to be considered quasi legal assets; for the judgment creditor may redeem and thereby acquire a preference, which, we have seen, is the principal feature of a legal asset; and it is observable, that the assets will not in the case of judgment creditors be marshalled in favour of simple contract creditors. *Sharpe v. Scarborough*, post, 322, 3, in notis. Et vide further as to marshalling, *Aldrich v. Cooper*, 8 Ves. 382. But although a judgment creditor is entitled to a preference to the other creditors in the distribution of equitable assets, with-

But where one who was obligor in a bond, had in his lifetime made a mortgage of some lands, of which he was seised

Money paid to heir for his concurrence, where

out proceeding to an actual redemption of the estate, yet after a bill filed by creditors, the executor cannot by confessing judgment give preference. *Solley v. Gower*, 2 Vern. 61; and if after a decree to account against an executor, a creditor of the testator proceed at law, the executor may move that the creditor may be restrained from thus proceeding, and be directed to come in under the decree and prove his debt before the Master, with the other creditors of the testator; but an affidavit by the executor, that he has paid all the assets into court, is indispensably necessary to support the motion: such creditor will be allowed the costs of his proceedings at law before actual notice of the decree. But if he proceed at law after such notice, he will be subject to the costs of the subsequent proceedings. *Pitts v. Layton*, Toll. Ex. 456, referring to *Kenyon v. Worthington*, Dick. Rep. 668.

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According to a variety of antecedent cases, chattels, whether real or personal, which are mortgaged or pledged by the testator, and redeemed by the executor, although capable of being recovered in equity only, are declared to be assets at law in the hands of the executor for the value beyond the sum paid for the redemption. 3 Bac. Abr. 59, n. 1 Leon. 155. Moor, 858. 1 Rol. Rep. 158. 1 Brownl. 76. 2 Atk. 291. 1 Vern. 293. In the case of *Cole v. Warden*, 1 Vern. 410, it was made a *quære* (no decree on the point appearing) whether an equity of redemption of a mortgage for years was assets to pay bond debts? and a case of *Bennett v. Box*, was cited, wherein the Chancellor, with the advice of the Judges, resolved *not* to allow an equity of redemption on a mortgage in fee to be assets in equity to pay a bond creditor. In the case of *Placknet v. Kirk*, 1 Vern. 410, the same question arose; and the Chancellor inclined to the opinion, that the equity of redemption *was liable* to satisfy the debt; but respited his decree till the Master had reported a state of the case. The decree was afterwards pronounced in *favor of the bond creditor*. Reg. Lib. 1686, B. fo. 844. See also on this subject, *Lloyd v. Thursley*, 9 Mod. 463. *Anon.* 11 Mod. 5, where it was made a question, whether if tenant in tail contract debts by bond and die, and it can be made to appear that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, whether such lease in equity would not be assets in the hands of the *heir in tail* for payment of the bond debt; for it was said, that equity only made such leases descend: and it was the highest equity that a man's debts should be paid. No decision is subjoined. A similar point occurred in *Chapman v. Bond*, 1 Vern. 188. But equity in these cases follows the law; and at law it is clearly settled, that as the estate of inheritance in fee simple is not itself liable to *simple contract debts*, nor the estate in fee tail liable to *any debt of the ancestor*, so neither shall the term which is attendant upon it be liable to those debts; and it makes no difference whether the term be attendant by construction, or by express declaration. *Thurston v. Attorney-General*, 1 Vern. 340. *Tiffin v. Tiffin*, *ibid.* 1. 188.—The old doctrine of assets has been much varied by the modern decisions, as we have

Reference to antecedent cases.

Attendant term in nature of real assets.

mortgage was
beyond its va-
lue, not assets.

in fee, for more than the value (a); and the mortgagee offering the lands in sale, the purchaser would not proceed, unless the heir of the mortgagor, who was also heir of the obligor, would join in the conveyance, and the heir had 200*l.* of the mortgage money for joining; the question was, whether this 200*l.* was assets? Lord Chancellor—This is not assets, having been paid to buy off the obstinacy of the heir, not for the value of his equity, which was worth nothing.

Equity of re-
demption of
leasehold estate

[322]
extendable quo-
usque against
conusor of sta-
tute, but not
against his ex-
ecutor.

Where a man, possessed of a term for years, made a mortgage of it to A. and afterwards acknowledged a statute to B. and then confessed a judgment to C., the bill was to have the equity of redemption of this term, which was vested in the executor, and so become assets, to be administered in a course of administration, and subjected to the judgment; a judgment in a course of administration at law being to be preferred to a statute (b). It was insisted, on behalf of B. that he had the statute, and that having got the term extended in the hands of the executor, a subsequent judgment could not avoid that extent. But the Lord Keeper was of opinion, that a term for years was not extendable by the *conusee* of a statute in the hands of an executor, and though it were extendable in the life-time of the *conusor* in his hands, yet the extent was but *quousque*, and if the *conusor* aliened the term before extent, the statute bound not the term (z). And then, if it were not extendable in the hands of the executor, it was but a chattel, like a jewel or a horse, and then a judgment must be preferred in course of law to a statute.

Judgment pre-
ferred to sta-
tute.

Equity of re-
demption on
mortgage of

But such equity of redemption of a term for years, it is presumed, may be considered as equitable assets only, and

(a) *Dunn v. Green*, 3 P. Wms. 10. (b) *Morgan v. Sherrard*, 1 Vern. 293.
[et vide S. P. post, 322, 3.—Ed.]

already seen; and these ancient determinations must now be considered as obsolete. For further on assets, see *Lothian v. Hassel*, 4 Bro. C. C. 167. Serjt. Williams' note to *Jefferson v. Morton*, 2 Saund. Rep. 8. *Doe v. Hutton*, 3 Bos. & Pul. 645. Toller on Exec. p. 550, and Index, *voce* Assets.

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(Z) So it is said in 19 Vin. Abr. 554, the goods and chattels cannot be extended in the hands of a grantee. 30 Edw. 3. 23 b.

then it seems that the creditor, by judgment and by statute, would be entitled *pari passu*. Thus, where C. made a mortgage, and died possessed of the equity of redemption of a *term for years*, leaving greater debts than his estate would pay (c): a question arose in Chancery, whether this mere equity of redemption was only equitable assets and distributable equally, *pro rata*, among all the creditors, without regard to the degree or quality of their debts; or, whether it should be applied in a course of administration; in which case the bond creditors would swallow up all the assets without leaving any thing for the creditors upon simple contract? And it was solemnly determined, that this equity of redemption was equitable assets only; for, the mortgage being of the *whole term*, and forfeited at law, and the right of redemption being *barely* an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable amongst all the creditors, *pro rata*, without having respect to the degree or quality of the debts; all debts being, in a conscientious regard, equal, and *equality the highest equity* (A).

(c) Creditors of Sir Charles Cox, 3 P. Wms. 341.

(A) On the authority of this case it was expressly decided in *Hartwell v. Chitters*, Amb. 308, that an equity of redemption of a leasehold estate is equitable assets. But the case cited in the text was in fact left undecided; for it being referred to a Master to ascertain which were legal, and which were equitable assets of the testator, and only two creditors appearing who were in equal degree, the Master declined to distinguish the assets; and consequently the point was not determined. See Mr. Cox's note (2), to the case, 3 P. Wms. 343.

Observations on case in text.

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The Solicitor-General, in his arguments, in the case of *Sharpe v. Scarboro'*, alludes to the cases of Sir Charles Cox's creditors and *Hartwell v. Chitters*, as being over-ruled; and he lays down the rule to be, that the equity of redemption of a leasehold estate is clearly assets at law, and the executor chargeable there with the difference between the value of the estate and the sum he paid in redemption of it; and he contended, that in the case of a mortgage of a freehold estate, the equity of redemption was *assets at law*, and it could not be suggested, he said, that the specialty creditors were not entitled to their remedy against those estates descended as legal estates, though they could not be got at but through the medium of a court of equity. The Lord Chancellor however remarked, that without deciding whether the case of the creditors of Sir Charles Cox was right or wrong, it only applied to bond and not to judgment creditors; and his Lordship decided, that the judgment creditors were to be paid in the first instance; in effect, that the equity of redemption was as to the judgment creditors to be administered according to the priority of legal assets. Et vide ante, 318, in *notis*, and next note.

Equity of redemption is a quasi legal asset as to judgment creditor.

Money received by heir for release of equity of redemption, not assets.

A bill in Chancery was filed to be relieved against the heir of the mortgagor for money received after his father's death, for a release of an equity of redemption (d). Finch, Lord Keeper, conceived this was no assets in law to satisfy a judgment acknowledged by the mortgagor after the mortgage, and before the release; for being but a bare right, and not being assets in law, the release being before the bill exhibited, was not fraud, and so not assets in equity.

Nunc secus, semb.

But this distinction, on the ground of the judgment having been acknowledged after the mortgage, and so not attaching upon the equity of redemption, as being but a bare right, seems to be done away; now such equity is considered as a title, and as imitating the legal estate in all respects, even more closely than a trust (B).

Reversion on mortgage for years, legal assets, and attracts redemption, but judgment will be with cesset executio;

If lands in fee be mortgaged for a term of years, the reversion in the mortgagor, expectant upon the determination of the term for years, will be *assets* at law liable to debts, and attract the redemption (e). In such case, although the mortgage be for a thousand years, yet the bond creditor may have

(d) *Freeman v. Taylor*, 3 Keb. 307. [et vide S. P. ante, 319, 20.—Ed.]

(e) *Cole v. Warden*, 1 Vern. 410. *Massam v. Harding*, Exchequer, 1734. *Spencer v. Biffin*, at the Rolls, Michaelmas Term, 1734. [This case was probably the same as that of the creditors of Sir Charles Cox, reported in 3 P. Wms. 340, and cited 2 Atk. 291. It

appears by the Register Book, that *Biffin* was the maiden name of Sir Charles Cox's second wife, Reg. Lib. B. 1734, fo. 113. For observations on which case, see ante, p. 322 a, 3, n. (A).—Ed.] Et vide 1 Salk. 354. [S. P. *Warwick v. Edwards*, Dick. 51. *Placknet v. Kirk*, 1 Vern. 411, and see last note.—Ed.]

Doctrine of assets inapplicable to judgment creditor.

(B) This is good law. The judgment (duly docketed or even not duly docketed, if the purchaser can be proved to have had notice thereof) is a lien on the equity of redemption against both the heir and purchaser from him, and, without reference to the doctrine of assets, the creditor may file a bill for redemption, and tack his judgment to the mortgage, on the rule, *Qui prior est tempore potior est jure*. See ante, p. 320, n. (Y). So, per Lord Eldon, in *Sharpe v. Scarboro'*, 4 Ves. 541. "The cases which consider an equity of redemption as equitable assets, do not apply to judgment creditors, who are to be paid in the first instance." The case of *Freeman v. Taylor*, cited in the text, occurred before the statute of frauds, and must therefore be considered as irrelevant to the law which has obtained since that statute.

judgment against the heir of the obligor, and a *cesset executio* until the reversion come into possession (c).

But the judgment will be of assets *quando acciderint*, and the creditor cannot, by a bill in equity, compel the heir to sell the reversion, but must expect until it falls (f) (D). and of assets
quando acci-
derint.

Where creditors are plaintiffs (g), the usual claim is, that the debts shall be paid in the course of administration; but that is to be intended of legal assets, and not of assets in equity that are not assets at law (E). Petition when
creditors are
plaintiffs.

(f) *Fortrey v. Fortrey*, 2 Vern. 134. (g) *Solley v. Gower*, 2 Vern. 61.

(C) So, in *Plunket v. Penson*, 2 Atk. 294, (recognized by Mr. Justice Lawrence, in *Scott v. Scholley*, 8 East, 477) Lord Hardwicke observed:—If there be a mortgage for years, the reversion in fee in the mortgagor is legal assets, and the bond creditor may have judgment against the heir, with a *cesset executio*, until the reversion comes into possession, but where it is a mortgage in fee, the equity of redemption is not legal assets, and the heir may plead *riens per descent* to an action brought against him on the bond of the mortgagor. It is, however, assets in equity, and the creditor may have relief there. *Solley v. Gower*, 2 Vern. 61. Text confirmed.

(D) And Lord Hardwicke remarked, that it was a gross inaccurate expression in the law books, where it was said, that a reversion in fee was not assets, for though in such case the heir might plead *riens per descent*, yet when the reversion fell, a *scire facias* might issue on the judgment *quando*, &c. *Kinaston v. Clarke*, 2 Atk. 204. Reversion, as-
sets at law.

(E) The course of administration at law is, 1st. Testamentary expences. 2d. Crown debts. 3d. Forfeitures for non-compliance with penal statutes. 4th. Debts of record, as judgments, statutes, recognizances, preferring the former to the two latter. 5th. Specialty debts, as bonds, covenants under seal, and the like. Lastly, Simple contract debts, as notes of hand, book debts, &c. preferring debts to the king to debts of the subject. 2 Bla. Com. 511. But an executor paying simple contract debts, before notice of a bond debt, will not be liable as for a *devastavit*. *Hickey v. Huyter*, 6 T. R. 387. 2 Bac. Abr. 435. 2 Fonb. Tr. Eq. 407. Equitable assets in the hands of an executor are, in some respects, applied as legal assets are, as first to pay debts, and then legacies. *Hixon v. Witham*, 1 Vern. 482. *Walker v. Meagar*, 2 P. Wms. 552. S. C. Mose. 204. *Maylin v. Hoper*, Ridgw. Ca. temp. Hardw. 206, contra. *Gosling v. Dorney*, 1 Vern. 482; but they differ in this, that all the creditors take proportionably and not in a course of administration, as in the case of legal assets. Thus, if a testator devise subject to or for the payment of his debts and legacies, his simple contract creditors will be entitled to be paid *pari passu* with his bond or other specialty creditors. See Fonb. Tr. Eq. 1 vol. 283, 4, n. who cites *Woolstoncroft v. Long*, 1 Ch. Ca. 32. Course of admi-
nistration in
law and equity.

*Devise of equity
of redemption*

An equity of redemption is devisable for payment of

3 Ch. Rep. 7. *Hiron v. Wytham*, 1 Ch. Ca. 248. *Anon.* 2 Ch. Ca. 54. *Girling v. Lee*, 1 Vern. 63. *Child v. Stephens*, 1 Vern. 101. *Solley v. Gower*, 2 Vern. 61. *Wilson v. Fielding*, 2 Vern. 763. And in such case even creditors, whose demands are barred by the statute of limitations, have been let in before the legatees. *Gofton v. Mill*, 2 Vern. 141. *Dewdney Ex parte*, 15 Ves. 497.

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*Priority of
funds.*

The ordinary administration in equity of real and personal assets in the payment of *specialty debts*, is in the following order, 1st. *Personal estate* (with the exception of copyholds, which are not assets, *Parker v. Dee*, 2 Ch. Ca. 201), not specifically bequeathed or exempted expressly, or by plain indication from the payment of debts. *Samuel v. Wake*, 1 Bro. C. C. 145. *Davis v. Topp*, *ibid.* 526. S. C. 2 *Ibid.* 259, n.; and see 1 *Ibid.* 58. 2d. *Land expressly devised* for (not merely charged with) the payment of debts. *Davis v. Topp*, *ubi supra*. 3d. *Descended estates*. *Barnwell v. Lord Cawdor*, 3 Madd. Rep. 453. 4th. *Lands charged* with the payment of debts. *Harmood v. Oglander*, 8 Ves. 124, 5. *Donne v. Lewis*, 2 Bro. C. C. 263. *Manning v. Spooner*, 3 Ves. 117. *Milnes v. Slater*, 8 *Ibid.* 306. *Watson v. Brickwood*, 9 *Ibid.* 447. And, 5th. *Estates impliedly exempted* from the payment of debts by a beneficial devise to third persons. 3 W. & M. c. 14. The distinction between land *expressly devised* or only *charged* with the payment of debts seems to apply in the above instance only. The idea which formerly prevailed, that where lands were expressly devised for the payment of debts, the personal estate ceased to be the primary fund for the payment of debts, though it remained so where there was merely a charge of the debts upon the real estate, is exploded. In both cases the personal estate remains primarily liable. See *Stapleton v. Colville*, For. 298. *Lord Inchiquin v. French*, Amb. 38. *McClelland v. Shaw*, 2 Sch. & Lef. 545.

*Simple contract
debts.*

The same administration of assets is made in equity in the payment of *simple contract debts*, except that as to them *descended estates* are not liable, unless in those cases where the deceased debtor was at the time of his death a *trader* (see *Hitchon v. Bennett*, 4 Madd. Rep. 180. *Keene v. Riley*, 3 Meriv. 436), according to the acceptation of that word in the bankrupt laws, 47 Geo. 3. sess. 2. c. 74. s. 1. This act, it is observable, does not extend to copyholds.

Personal estate.

The personal estate is the fund first liable to the payment of debts, and is often called "the natural fund;" nor can a testator, as against his creditors, exempt the personal estate; but he may bequeath his personal estate, as against his heir or any other representative, clear of the payment of his debts. *Walker v. Jackson*, 2 Atk. 624. *Bridgman v. Dove*, 3 Atk. 202. *Attorney-General v. Downing*, Amb. 572, 3.

*Mode of affect-
ing assets.*

The mode of affecting assets is by action at law, or by bill in equity. When a bill has been filed by one or more creditors against the executor for an account of assets, the executor will not afterwards be allowed any *voluntary* payments made without suit. *Bright v. Woodward*, 1 Vern. 369. S. P. 2 Ch. Ca. 201. *Darston v. Orford*, Pr. Ch. 188. See *ib.* 79. If a decree be obtained on a bill for the administration of assets, and some of the creditors sue at law, the court will interpose by injunction to restrain them; but until

debts (h); [and the devise of an equity of redemption to *to pay debts, makes it equitable assets.*

(h) Hardr. 469. *Turner v. Gwynn*, 2 Vern. 41. [S. C. ante, 266, 7.—Ed.]

a decree is obtained, no injunction can issue. *Ashley v. Pocock*, 3 Atk. 208. *Martin v. Martin*, 1 Ves. 213. *Mocher v. Reed*, 1 Ball & Bea. 320. Et vide 8 Ves. 520. If before a decree obtained several creditors proceed by different bills in equity for satisfaction of their demands, the court will not stop the suits, because of the priority which may be gained, although this may create an entanglement and difficulty on the estate; but after a decree obtained an injunction will be granted. *Martin v. Martin*, ubi supra. As to real property, it is further observable, that if an intestate debtor die seised of freehold estates of inheritance to a large amount, and possessed of little or no personal property, the specialty creditor whose debt is secured by an instrument affecting the heir, may either file a bill in equity against the heir for an account of the assets and a sale of the estates for the satisfaction of his debt, or he may, if he please, proceed at law against the heir without suing the personal representative of his deceased debtor, 3 Wooddes. Lect. 486; but an equity of redemption on a mortgage in fee, cannot, we have seen, be reached at law by a specialty creditor; and therefore such an equity stands on the same footing as estates expressly devised for the payment of debts. But if such a debtor, instead of suffering his estate to descend to his heir at law, devise the same beneficially to a third person, not for the payment of debts, then before the statute of 3 W. & M. c. 14, such devise would defraud the specialty creditor of his remedy. To obviate that mischief, the statute lastly mentioned enacted, that all devises of real estates by tenants in fee simple, or by persons having power to dispose of estates by will, shall, as against such creditors, be deemed to be fraudulent and void; and that they may maintain their actions jointly against the heir and devisee. Thus legal interests in freehold estates, devised for other purposes than the payment of debts, are become in favor of specialty creditors real assets at law, without the assistance of a court of equity: in respect to which such creditors may elect to resort in the first instance against the heir and devisee, without suing the personal representative of their deceased debtor. 2 Atk. 125. 3 Ib. 406. 3 P. Wms. 333. Et vide 2 Ib. 234. If such creditor file a bill in equity on the statute to affect the real assets in the hands of the devisee, the heir must be made a party to the suit; for a bill in equity for that purpose is in the nature of an action at law; and as the action by the express provision of the statute is to be brought jointly against the heir and devisee, so the bill must be filed against them both, 1 P. Wms. 99, though in such case the heir or devisee shall, it seems, have this relief—namely, to stand in the place of the specialty creditor, and reimburse himself out of the personal estate. 1 P. Wms. 680. The student should also be apprized, that although legal interests in freehold estates, devised for other purposes than the payment of debts, are become legal assets in favor of specialty creditors, yet that since equities of redemption are in themselves but equitable assets merely, and recoverable only in a court of equity, the specialty creditors of the testator can have no resort to such interests, devised to third persons, for other purposes than the payment of debts, except

Injunction after decree.

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Devised estates and equities of redemption how affected, by what creditors

trustees for the payment of debts will make it equitable assets] (hh) (F).

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Devise of equity of redemption to trustee and executor for payment of debts distinguished.

It was formerly held, that if an equity of redemption were devised for payment of debts, a distinction was to be taken in the application of the assets, where lands mortgaged were devised for payment of debts generally; and where the devisee

(hh) [*Baily v. Ekins*, 7 Ves. 319.—Ed.]

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continued.

Devise to executor with mere power of sale, or mere charge of debts, makes equity of redemption equitable assets.

through the medium of the Court of Chancery. For further on the appropriation of funds, see post, Chap. XVIII.

(F) And by the modern adjudications it is established, that a devise to the executor will have the like effect, 2 Fonb. Trea. Eq. 401, n. (e), 5th ed.; and although the executor have but a mere power to sell, yet it should seem the right to redeem will be equitable assets equally the same. Toll. Ex. 414. Post, 328, 9. The doctrine of equitable assets is, in its principle, so consonant with natural justice, that it has been gradually extended (1 Bro. C. C. 140, n. (†)); and the distinction between a devise to a trustee and to an executor, next alluded to in the text, has been continually qualified, and appears now to be altogether abolished: and the effect of the devise or power of sale is to let in creditors by simple contract to the prejudice of creditors by specialty. A mere charge for the payment of debts will affect an equity of redemption, and will make it equitable assets in the hands of the heir or devisee. *Prowse v. Abingdon*, 1 Atk. 484. *Buckley v. Williams*, 1 Dick. 387, n. (a). *Hargrave v. Tindall*, 1 Bro. C. C. 136, n. (†). *Batson v. Lindegren*, 2 Bro. C. C. 94. *Shepherd v. Lutwidge*, 8 Ves. 26. And a devise to pay debts out of the profits seems equivalent to a devise to sell for the purpose of converting the estate into equitable assets. 1 Bro. C. C. 312, but see 2 Vern. 718. 2 Bro. C. C. 614.

But to make equity of redemption equitable assets in hands of heir, intention to break descent must appear on will.

It was formerly holden, that where an estate descended to the heir charged with the payment of debts, it was legal assets in him, *Freemoult v. Dedire*, 1 P. Wms. 430. *Plunket v. Penon*, 2 Atk. 290. *Deg v. Deg*, 2 Cox's P. Wms. 416, n. (2); and it was inferred from an expression of Lord Thurlow, in *Silk v. Prime*, 1 Bro. C. C. 138, n. (†), that in no case could the assets be equitable, unless the descent were broken. But in the case of *Baily v. Ekins*, ubi supra, Lord Eldon held otherwise, and said, that in a case of mere charge the assets were equitable, although the descent was not broken. And his Lordship put the case of a devise to trustees in trust to pay debts; and the trustees all dying in the life-time of the testator, whereby the estate would descend to the heir at law, who his Lordship observed must have taken the estate as the trustees would have received it, namely, subject to the debts; and yet the descent was not broken, but intended to be broken. And therefore, said Lord Eldon, it would be the more accurate expression to say, that it must appear on the will that the testator meant the descent to be broken. Vide etiam *Shipard v. Lutwidge*, 8 Ves. 30; and as to the statute of fraudulent devises, see ante, 69, n. (N).

for payment of debts was made executor (i). In the former case the assets were considered as equitable, and all the creditors as equally concerned and entitled, and none were to be preferred before the other. Statutes, judgments, bonds, or simple contract debts, *if they did not attach upon the very land* so devised, were to be paid in proportion and by average; and so of other equitable incumbrances. But in the latter case, the equity of redemption, in the hands of the executor, was considered as legal assets, and he was obliged to pay debts on specialty before debts on promises: the former having an artificial preference at law, though naturally, and in conscience, a debt by contract without specialty is as justly due as the other (a).

Thus, where A. (k), having made a settlement of lands which he covenanted were of a certain annual value, mortgaged all his other lands, and then confessed a judgment defeazanced on payment of a sum certain; afterwards A. made his will, and devised *all* his lands for payment of his debts, *and constituted the devisee in trust for payment of debts, executor*. A bill was filed by the judgment creditor to have the trust performed

Equity of redemption devised for payment of debts equitable assets. Secus if devise be to executor. (But see infra, 328.)

(i) *Child v. Stephens*, 1 Vern. 101. 2 Ch. Ca. 54. *Hixon v. Wytham*, 1 Ch. Ca. 248, 249.

Hixon v. Wytham, 1 Cha. Ca. 248; but it was decided contrary to the case of *Girling v. Lee*, which it was cited to support. There is however a case of *Hickson v. Witham*, Finch, 195, which seems more in unison with the doctrine advanced in *Girling v. Lee*.—Ed.]

(k) *Girling v. Lee*, 1 Vern. 63. *Hixine v. Mortley*, cited in *Girling v. Lee*, [Et vide *Clutterbuck v. Smith*, Pr. Ch. 127, and *Bickham v. Freeman*, ibid. 136. The case of *Hixine v. Mortley* was probably the same as

(G) It was so considered in *Edwards v. Graves*, Hob. 265. *Alexander v. Lady Gresham*, 1 Leon. 224. *Dethick v. Carravan*, 1 Lev. 224. 1 Roll. Abr. 290. G. 6. *Boswell v. Corant*, Hardr. 405; and it was transferred into equity on the principle, that decisions in equity follow the law. *Graves v. Powel*, 2 Vern. 248. *Anon.* 2 Vern. 405. Et vide *Clutterbuck v. Smith*, Pr. Ch. 127. *Blatch v. Wilder*, 1 Atk. 420. But where the devise was to the executor and his heirs, in trust to sell, this was considered an exception, because the lands must have gone in a course of descent; and the executor would take as trustee, and not as executor; and therefore in that case the lands were, and in a similar case still would be, it is conceived, equitable assets.

Cases confirming text.

Devise to executors and his heirs.

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and his debt satisfied. The defendant's answer admitted the devise for payment of debts, but set forth the jointure, covenant, and the mortgage, and that the lands jointured were not of the value for which they were given. The question was, whether the debt upon covenant and that upon judgment should be paid *pari passu*, or whether the latter should be discharged? And it was decreed, that the lands should be sold for payment of debts, according to the trust in the defendant's father's will, and that the plaintiff should be let in for a satisfaction of his judgment, without regard had to the covenant for making good the jointure.

Trustee being made executor, equity of redemption is legal assets.

And where lands mortgaged were devised to a trustee for payment of mortgages and specific legacies (l), though the remainder was given to him in fee, yet the *trustee being made executor*, the *equity of redemption* was considered as *legal assets* in his hands.

The contrary is now the better opinion. (And see ante, 324, a n. (E).)

But it was held, in the case of *Deg v. Deg* (m), which was a devise of lands, mortgaged, to trustees, *who were likewise* nominated *executors*, to pay his debts; that the premises, *being mortgaged in fee* by the testator, and he having *nothing* but an *equity* of redemption, *that* could be only *equitable assets*, and consequently *must* go amongst all the creditors equally.

Same.

And at present the better opinion seems to be, that although lands be devised to trustees for payment of debts, *who* are *likewise* constituted *executors*, yet they will be considered as *equitable assets* (n). Thus where a devise was to trustees for payment of debts, and the *same* persons were made *executors*, the court said, that the assets should, notwithstanding, be *equitable* and not legal; for, though there were cases in Vernon's Reports, in which it was held, that where trustees were made executors, debts should be paid in a course of

(l) *Brunt v. Best et al.* 1 Vern. 69. et supra. [233. 238.—Ed.]

(m) 2 P. Wms. 412. S. L. *Lewin v. Oakley*, 2 Atk. 50.

(n) *Lewin v. Oakley*, 2 Atk. 50. Et *Silk v. Prime*, 1 Bro. Rep. Chan. 138,

in note.

administration (vide *Girling v. Lee* (o), yet the modern resolutions had been otherwise (H).

It is likewise said to have been settled in the time of Wright, Lord Keeper, in a cause between *Herbert v. Herbert* (p), upon consideration had of all the former cases, that where lands are devised for payment of debts and legacies, the debts being such as have no lien upon the lands, as debts by simple contract, &c. the debts should have no preference; but if there were not sufficient to pay all, they should be paid in proportion, (although it was otherwise held in Lord Nottingham's time, who used always to say that a man ought to be just before he was bountiful). The reason seems to be, because the *will* of the owner *alone* makes the *land* liable, and *that*

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Lands devised for payment of debts and legacies, debts not to be preferred to legacies.

(o) Vide supra, 327.

Wytham, 1 Cha. Ca. 248. S. C. su-

(p) 2 Freem. 270. S. C. 2 Eq. Ca. pra, 327. *Whitton v. Lloyd*, 1 Cha. Abr. 371. Sed vide contra *Hixon v.* Ca. 275.

(H) After quoting *Lewin v. Oakley*, ubi supra, in a case where the whole doctrine on this subject was sifted to the utmost, Lord Camden observed, "And now I think the old rule is overthrown; and that wherever the land itself is devised to the same persons, who are executors, the assets will be equitable. And I hold the case to be the same whenever the land is devised to them, or to them and their heirs; for in both cases they are equitable trustees. The descent is broke, and the specialty creditors have lost their fund. And I can hardly now suggest a case where the assets would be legal, but *where the executor has a naked power to sell qua executor.*" *Silk v. Prime*, 1 Bro. C. C. 138, n (‡). Et vide *Prowse v. Abingdon*, 1 Atk. 484. And even in the case lastly mentioned by Lord Camden, it should seem that the descent will be considered as broken, since the vendee under the power will be in by the deviser, although it be true that in the interim, between the death of the testator and the execution of the power, the equity of redemption will descend to the heir at law of the testator, according to the rule established in *Warnford v. Thompson*, 3 Ves. 513. At all events an *intention* to break the descent is apparent on the will; and it is observable that Sir Samuel Toller lays down the rule thus broadly:—"if the real estate be by any means given to the executor, the produce of it when sold shall not be applied in a course of legal administration, but be distributed as *equity prescribes*," citing 1 Bro. C. Rep. 137, 8. 2 Fonbl. 2d ed. 398, in note. Vide Harg. Co. Litt. 113, note 2; and 2 P. Wms. 552. But note, a power to charge an estate with a sum of money, unless executed, will not be assets for the payment of debts. *Lord Cornwallis's case*, 2 Freem. 279. *Harrington v. Harte*, 1 Cox. Ca. Ch. 131.

Lord Camden's remarks in Silk v. Prime.

Executor having power to sell equity of redemption, equitable assets.

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gives no preference expressly or impliedly to one before the other (I).

Conveyance for payment of debts: second and third mortgagees have priority to bond and simple contract creditors, who are paid in average.

If a mortgage (q) be made of lands, and afterwards more money is raised by subsequent mortgages; and then the mortgagor, by deed in his life-time and by will, conveys and settles all his lands *unto trustees* for payment of his debts, by which they become equitable assets, the subsequent mortgagees, having a security for their money by a *lien* upon the estate, which the court will not take from them, and, in preservation of their own interest a right to redeem, shall be first satisfied; although the estate in question was in the first mortgagees, and the subsequent mortgagees had only an equity (K).

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Equity of redemption of trust estate devised for payment of debts, equitable assets, though devisee be heir at law.

If a devise be of the equity of redemption of a *trust estate* by the *cestui que trust*, subject to the payment of his debts, notwithstanding *the devisee be heir at law*, yet the equity of redemption shall be equitable assets.

(q) *Child v. Stephens*, 1 Vern. 101.

Simple contract debts obtain lien, when.

(I) Where however a testator lets in creditors by a mere charge, it is now settled, whatever doubts may formerly have been entertained to the contrary, that creditors are to be paid in preference to legatees. *Kidney v. Coussmaker*, 12 Ves. 155. And where there is an actual devise of lands for payment of debts, it has been already remarked, ante, 325, n. (E), that the ordinary course of administration of equitable assets is first to pay debts and then legacies. Creditors by simple contract cannot have any right (except by marshalling) against the real estate, unless the testator thinks fit to devise it for satisfaction of debts generally, yet they have never been held to stand in the same light as legatees. And though the statute of fraudulent devises would undoubtedly prevent a devise for payment of legacies so as to disappoint creditors by specialty, it would not prevent a devise for payment of debts generally, though the effect would be to let in creditors by simple contract to the prejudice of creditors by specialty. See *Ridout v. Plymouth*, 2 Atk. 104. *Lingard v. Derby*, 1 Bro. C. C. 311. *Hughes v. Doulsen*, 2 Bro. C. C. 614. and *Kidney v. Coussmaker*, ubi supra.

Administration of equitable assets.

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(K) Hence therefore the equitable administration of assets assimilates, in a great degree, to the legal course of administration, paying first debts which are liens on the lands, as second and third mortgages, judgments, statutes, &c. according to priority of date (post, 446, 7), then debts by specialty and simple contract debts, *pari passu*; but it is said, that if the king be in equal degree with either of these latter he will be preferred, because he cannot lose his right in any instance; and where they interfere *his* will always be preferred. Co. Litt. 30.

Thus, where *Penson* (r), the testator, who was the *cestui que trust* of a real estate, made a mortgage of it in fee; and, the equity of redemption being in him, he by his will, gave and devised to his dear son and to his heirs for ever the mortgaged premises, subject nevertheless to the payment of his debts, annuities, and legacies, and then died indebted by bond and simple contract; one question was, whether an equity of redemption of a mortgage in fee of a trust estate ought to be considered as legal or equitable assets? Lord Hardwicke, in giving judgment on this case, admitted that, if a mere trust estate descended upon an heir at law, it would be considered as legal and not as equitable assets; which was founded upon the third clause of the statute against fraudulent devises, that gave a specialty creditor his remedy at law by an action of debt against the heir of the obligors. But his Lordship said, that the statute had not made a mortgage in fee of a trust estate subject to the same thing; that if the plaintiff was under the necessity of coming to Chancery for relief, the court would act according to its known rules of doing equal justice to all creditors, without any distinction as to priority. And the real estates were ordered to be sold, and that, after paying off the mortgages, the creditors should be paid what was left *pari passu*.

An equity of redemption (s) has never been held to be liable to a bond creditor in the life of the mortgagor (L).

Equity of redemption not liable to creditors in life-time of mortgagor. There may be a possessio fratris of an equity of redemption. Semb.

In the case of *Penville v. Luscomb* (t), at the Rolls, the 4th of February, 1728, Sir Joseph Jekyll was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. *Sed quære*; for in arguing the same case, Mr. Fazakerley said he had a note of a case with the same names,

(r) *Plunket v. Penson*, 2 Atk. 290.
[S. C. ante, 324, n. (C).—Ed.]

(s) 2 Atk. 292.
(t) Cited 1 Atk. 604, *contra*. Ibid.

(L) Because a bond creates no lien on the land till judgment entered up and docketed. But the equity of redemption may be equitable assets, and as such liable to the bond creditor. This, however, is a different thing, and can only happen after the death of the mortgagor.

Bond no lien on equity of redemption in life-time of mortgagor.

determined by Lord Cowper, in 1716, wherein his Lordship held directly the contrary; namely, that there might be a *possessio fratris* of an equity of redemption (u). And the latter opinion seems to me to be the most reasonable; for there may be a *possessio fratris* of an use, and yet, in law, an use was neither assets in the executor nor in the heir, as an equity of redemption is; besides, the mortgagee, before foreclosure, is, as to the inheritance, a trustee for the mortgagor (x), and a trust-estate, now, is analogous to an use at common law (M).

(u) Co. Lit. 14 b. 1 Co. 124. b. Plow. 58.

(x) 1 Atk. 606.

Of a *possessio fratris*.

(M) There may be a *possessio fratris* of a trust, 1 Co. 121 b. 2 P. Wms. 713. Hardr. 488. 491. 2 Com. Dig. Chancery (410, 11). Watk. Desc. 106. Gilb. U. 28, n. (3), 3d edit. 1 Saund. U. & T. 217; and hence it may be contended that a *possessio fratris* will arise on an equity of redemption of a mortgage in fee, which is in the nature of a trust; and it is so laid down in the text books. See Butl. Co. Litt. 205 a, n. (1), s. 2. 5 Bar. Elem. 845. Et vide *Casborne v. Scarfe*, 1 Atk. 603. But it should seem that the elder brother must do some act indicative of a seisin or possession to entitle his sister to the equity of redemption. The receipt of rents, or the bringing a bill for redemption, will be sufficient for this purpose. The case of *Penville v. Luscombe*, as reported by Moseley, 72. 122. and 1 Atk. 604, warrants this position. It was there said by Sir Joseph Jekyll, that in order to make a *possessio fratris* of an equity of redemption on a mortgage in fee, the elder brother should have brought his bill against the mortgagee, or the mortgagee should have paid him the rents and profits of the estate. And therefore where a father had made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one wife, and a son by another, and the eldest son died without bringing his bill, his Honor decreed the equity of redemption to the younger brother, considering that the elder brother, (the son of the mortgagor), not having received the rents and profits, or filed a bill against the mortgagee, had never obtained that constructive possession of the equity of redemption which was necessary to entitle the sister to inherit it. There is also some account of this case in 7 Vin. Abr. 160, but it is very loose, and quite incompatible with the other reports.

There may be a *possessio fratris* of an equity of redemption. *Semb.*

In an appendix to the report of the great case of *Cholmondeley v. Clinton*, by Jac. & Walk. a statement of this case of *Penville v. Luscombe*, from the Register Book, is added. See 2 Jac. & Walk. 201. The marginal *placita* is to this effect: "A. having a son and daughter by one venter, and a son by another, convey lands to B. his surety in a bond, as an indemnity, and dies. B. pays the bond and mortgages the lands. The eldest son dies. The mortgagee having been in possession without account or acknowledgment, *semble*, there was no *possessio fratris* of the equity of redemption:" and reference is made to Lord Hardwicke's observations on the principal case as

In general, no person will be allowed to come into equity for a redemption (y), but he that is *entitled* to the legal estate of the mortgagor. Person redeeming must be entitled to legal estate.

Thus (z), where the plaintiff, claiming under the heir general, came to redeem a mortgage, and the defendant, by answer, set forth a deed of entail, entitling another person to the equity of redemption; the plaintiff prayed he might redeem at his General heir must shew estate tail barred before he can redeem.

(y) *Bickleys v. Dorrington, Monk v. Pomfret*, Quære, where? 2 Eq. Ca. Abr. 605. 39 Barnard. Rep. 30. [15 Vin. Abr. 460.—Ed.] (z) *Lomax v. Bird*, 1 Vern. 182.

furnished to the reporters by Mr. Pepys, whose manuscript note of *Casborne v. Scarfe*, represents Lord Hardwicke as saying, that as to the case of *Penville v. Luscombe*, which was mentioned to have been heard at the Rolls on the 4th February, 1728, it was a pauper cause; and one question there was, whether there might be a *possessio fratris* of an equity of redemption? His Lordship had read over the decretal order in the Register's Book, and it concluded that his Honor declared he would take time to consider of that point before he delivered his opinion; and Lord Hardwicke could not find that it was determined or ever came on again. See 2 Jac. & Walk. 200. The question is, whether Moseley's report of Sir Joseph Jekyll's judgment is to be invalidated, because it cannot be found in the Register's Book? Is there any thing in principle opposed to the doctrine laid down in the former part of this note? It should seem not. Mr. Butler, *arguendo*, considered the case of *Penville v. Luscombe* as establishing these three propositions. *First*, that when there is a mortgage, and the mortgagor receives the rents of the estate, he is considered to have an equitable seisin; *Second*, that when the mortgagor does not receive the rents, or otherwise assert his title, he is not considered to have an equitable seisin; and, *Third*, that when a person entitled to the benefit of a trust does not assert his right in due time, the trustee ceases to be a trustee for him, and becomes a trustee for the actual possessor. The mortgagee was trustee of the equity of redemption, in the first instance, for the eldest son, but on his death he became trustee, not for the heir of the person who once had the right, but neglected to assert it, but for the representative of the person to whom it had last belonged. These observations are founded on the supposition that the report in Moseley is correct. Indeed, there seems little in principle to produce against it.

Propositions deducible from case in text.

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The entry of a copyholder will be a sufficient act to cause a *possessio fratris* in the lord of the manor. 1 Watk. Cop. [45]; and the possession of the *cestui que trust*, will, it is apprehended, cause a *possessio fratris* between the heirs of his trustee who may never have entered or exerted any personal act of ownership, and who even may have died abroad. See, on the subject of seisins and possessions, the late case in 3 Barn. & Cress. 298. Cov. Watk. Elem. Index. *Possessio Fratris*.

peril, but the Lord Keeper would not permit him to do it, unless he could make out that the estate-tail was docked.

But third persons interested may redeem, if those entitled refuse or collude.

But if third persons be interested in the equity of redemption, and he or they who are at law entitled to the estate, refuse to redeem, or act collusively, any person interested will be permitted to redeem.

Minor part of creditors, or even one creditor, may redeem, if others refuse (N) at peril of costs.

Thus (a), where one mortgaged his leasehold estate, and afterwards became a bankrupt, a commission issued, and a

(a) *Franklyn v. Ferne*, Barnard. Rep. 30. [Et vide *Exton v. Greave*, 1 Vern. 138, and ante, 124.—Ed.]

Creditors may redeem on shewing that trustees or executors refuse, collude, or are unsafe.

(N) To entitle creditors thus circumstanced to redeem, a special case must be made out, as that the assignees, trustees, or executors refuse, collude, or are insolvent. In *Troughton v. Binkes*, 6 Ves. 573, where a bill was brought by creditors under a deed of trust, praying a sale and not a redemption, to which sale the mortgagee would not consent, it was held, that the creditors could not have a decree for a redemption against a mortgagee, unless the trustees were colluding, or it was unsafe to trust them with the property, which was not the case; and the bill was dismissed. The Master of the Rolls observed, that the plaintiffs were creditors under the trust deed. The trustees could come for a redemption; but he doubted whether two or three creditors could come in their own names to redeem for their own benefit. It struck him as extraordinary that they should file a bill to redeem for themselves, and so gain a preference; for then *they* must be redeemed. But it was admitted, that they could not claim to redeem to that extent; but if any creditors choose to come in and contribute, then all were to have the benefit. His Honor also thought that the trustees should have come and have claimed the benefit for the creditors; not that the creditors themselves should come in the first instance, and as a matter of course. To entitle them to *that* a case ought to be made; as that the trustees were called upon to redeem, and refused, or that they were colluding. *Doran v. Simpson*, 4 Ves. 651. And his Honor recognized the general principle laid down by Lord Parker in *Franklyn v. Ferne*, and stated himself to be confirmed in opinion by the authority of that case, as well as by analogy, that the court could not, in this short way, decree a redemption; and therefore dismissed the bill.—If the mortgagee, pending a suit by the creditors of a mortgagor to have the estate sold to pay their debts, obtain a decree to foreclose, the creditors may nevertheless redeem him on payment of principal, interest, and costs, on the ground of fraud. *Soley v. Salisbury*, 9 Mod. 153. And if lands are limited, in a settlement to daughters, with a proviso, that if the heir, executor, or administrator of the settlor, pays 400*l.* at a certain day to trustees, that then the limitation shall cease, this being only a kind of collateral security for the money, the creditors of the settlor, or he in reversion, may redeem. *Frederick v. Aynscombe*, 2 Eq. Ca. Abr. 594. MS. notes.

meeting was had by the creditors to consider whether the assignees should bring a bill to redeem. The majority of the creditors were of opinion, that it was not advisable so to do. In consequence of this opinion the assignees could not do it, by an express clause in the statute of the 5th Geo. 2. relating to bankrupts. The rest of the creditors thought it was advisable to file a bill for redemption, and thereupon brought a bill in their own names against the mortgagee and the assignees, praying to be let in to the redemption of the lease. The assignees, by their answer, took part with the plaintiffs. One question was, whether the creditors of a bankrupt had a right, in this case, to bring their bill against the mortgagee to compel him to redeem, making the assignees of the bankrupt defendants? Mr. Justice Parker, who sat for the Chancellor, was of opinion they had. He said that it was very true that, in general, no person should come into equity to redeem, but who was *entitled* to the legal estate of the mortgagor (o). So, if an executor were willing to get in the debts of the testator, there was no foundation for a creditor to bring his bill for that purpose. That in general, where there were proper persons to get in the estate of another, a court of equity would not suffer either the creditors of the testator or the creditors of a bankrupt to bring a bill in equity in order to get in that estate. But that, if an executor or assignees under a commission col-

(O) Barnardiston reduces this point to a very vicious bearing in his marginal epitome, thus:—"The rule laid down that no person shall be allowed to redeem in equity but he that has the *legal* estate, is right;" consequently, if the mortgage be in fee no person can redeem, not even the mortgagor; for he has not the legal estate, *that* being in the mortgagee. The best expression of the rule would, perhaps, be to say, that he who comes to redeem a mortgage must shew a title to the equity of redemption. Mere possession without title will not give any person a right to redeem, *per* M. R. in *Cholmondeley v. Clinton*, 2 Meriv. 173. But a *prima facie* title is sufficient, and an issue will not be directed, though the title is complicated, if it be uncontradicted. *Pym v. Bowerman*, 3 Swanst. 241.

He who comes to redeem must shew a title.

On a suit to redeem, the mortgagee cannot object that a valid legal conveyance to him is not stated. If, therefore, the bill to redeem contains an informal allegation of the mortgage, not shewing that any legal estate passed to the mortgagee, the plaintiff mortgagee in possession cannot take advantage of this defect; for that would be objecting to his own title, which the court would never allow. *Roberts v. Clayton*, 3 Anstr. 715.

But mortgagee cannot object that a valid conveyance is not stated.

luded with a debtor, there was no doubt but that a creditor might bring his bill in order to take care of the estate, and charge the assignees or executors with such collusion. That, in this case, there was a meeting of the creditors of the bankrupt to consider, whether it was proper that the assignees should bring a bill in order to be let in to a redemption of his estate; and the majority of the creditors were of opinion that it was not. That the assignees thereupon could not bring this bill, that was for the benefit of the bankrupt's estate. That any creditor therefore had a right to bring such bill under peril of costs.

Equity will assist claims to redeem, except in cases of fraud.

And a court of equity will assist all persons claiming an equity of redemption, unless their title is directly against conscience. Therefore, where A. (b) married a young heiress, and by indirect means procured her to levy a fine on her inheritance when she was *under age* (P), and A.'s father was one of the commissioners who took the fine, and the uses of the fine were declared to be to her and her husband, and the heirs of their two bodies, remainder to the heirs of the survivor. The wife died in her minority without issue, and her husband survived her, and made a mortgage of the estate, and died without issue, and the estate descended to his heirs. But the

(b) *Packington v. Barrow*, Pre. Ch. 216. [S. C. 2 Eq. Ca. Abr. 474.—Ed.]

Settlement of real estate by infant previous to marriage.

(P) As to settlements by infants of their real estate before marriage, see *Clough v. Clough*, 5 Ves. 717. S. C. Wood. Lect. 453. Ath. Sett. 37. *Milner v. Harewood*, 18 Ves. 275. To enable an infant tenant for life (with remainders over to her issue) to levy a fine, or suffer a recovery, for the purpose of settling her estate, and advancing her in marriage, a writ of privy seal must be obtained. The course of proceeding is for the crown, upon the petition of the infant and her guardian, to grant letters under the privy seal of the Judges of the Court of Common Pleas, directing them to permit the infant to levy a fine or suffer a recovery, it is then in the discretion of the court to permit the fine to be levied, or the recovery suffered, according to the circumstances. *Doe v. Rawding*, 2 Barn. & Ald. 450. If the court permits a fine to be levied, or a recovery suffered, still it seems the infant may elect to confirm or annul it when she comes of age; for which see Cov. on Recov. 1820, p. 139, 40. The mode therefore of suing a writ of privy seal to enable an infant *female* to levy a fine or suffer a recovery, is, at the present day, rarely resorted to, being superseded by the modern practice of applying for an act of parliament in the first instance.

heir at law to the heiress, who had levied the fine, had purchased in the mortgage, and got into possession and levied a fine, and five years passed, and the deed declaring the uses of the first fine was lost. Then the heir of A., who was entitled under the first fine and deed, filed a bill to have a discovery of the deed, and a redemption of the mortgage. The heir at law of the heiress pleaded the ill practices in obtaining the fine, and also his own fine (c) and non-claim, and that there was no such deed as that of which the discovery was sought, or if there was, it was obtained by fraud. And one ground of argument used against the heir of A. was, that the Court of Chancery would not assist A.'s heir, who claimed under a fine so ill obtained, and the rather for that such heir was a volunteer without any agreement, previous to the marriage of the heiress, to settle her estate. *Et per curiam*, the defendant insists there was no such deed, or if there was, it was obtained by practice, and also on a fine and non-claim, and also that A.'s father could not have been assisted here, and the plaintiffs claim under him. *All titles at law that are not directly against conscience, shall be assisted here to a redemption*, and if there were only a blemish in the title, so should the heir of A.; but the fine and non-claim cannot be got over. The plea is good; dismiss the bill.

Fine, obtained by fraud, destroys non-claim.

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(c) *Quære*, as to the validity of this fine, if levied, while in possession under the mortgage (q).

(Q) The determination of the court seems to have proceeded on the circumstance of fraud, which it considered sufficient to avoid the fine; and that being the case, the heir at law of the heiress was, by his possession under the mortgage, remitted to his ancient right, and then as owner and not as mortgagee, he levied the fine to strengthen the title.

Text reconciled.

We may here observe what perhaps would more appropriately have been introduced in a former note, ante, 212, n. (P), that with respect to the non-claim on a fine, if the mortgagee be disseised, and the disseisor levy a fine, and five years pass after the proclamations without entry, whereby the mortgagee will be barred, yet if the mortgagor pay or tender his money to the mortgagee at the time appointed for performance of the condition, he will be allowed five years from the time of such tender or payment to prosecute his right in by the second saving of the statute of 4 Hen. 7. c. 24; because his title to the legal estate did not accrue till payment or tender of the money.

Non-claim on fine begins from time of tender or payment of money.

Stowell v. Lord Zouche, Plow. 373. 2 Bac. Abr. 532. Shep. Prac. Coun. 74. 79.

Equity of redemption governed by equitable rules.

But, although the power of redemption be an ancient right, which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet, being a right originating in, and, in fact, created by, a court of equity (d), it is made subservient to their rules.

Right to redeem and foreclose, must be reciprocal.

And it is said to be a maxim, that none can come to redeem a mortgage, when the mortgagee cannot compel the payment of the mortgage money; for the remedy ought to be reciprocal (R). Thus one ground upon which the court doubted whether it should decree a redemption in the case of *Coplestone v. Boxwell* (e) before-mentioned, was because W. R. had no remedy to recover his money.

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Redemption decreed absolutely, or on condition, according to justice of case.

And the mortgagor, or those claiming through him, on application to the court, will have redemption decreed to them absolutely, or under certain conditions, according to the nature and justice of their case.

Redemption viewed according to interest of applicant.

The court, in the exercise of this jurisdiction, views mortgages after forfeiture in two different lights, according to the interest of the party from whom the application comes. If the mortgagor seeks for redemption, he must do equity to the mortgagee, or the court will consider the estate as absolute in the mortgagee. On the other hand, if the mortgagee files his bill to foreclose, the court will enter into the essential nature of the contract, and, considering the transaction merely as a loan, oblige him to submit to be redeemed on the condition originally stipulated; the payment of the principal advanced with legal interest.

(d) *Sayle v. Freeland*, 2 Vent. 350. [S. P. *White v. Ewer*, 2 Vent. 340.

(e) *Supra*, 125. Com. Rep. 609. —Ed.]

Absence of mortgagee's heir, or loss or pawn of deeds, will prevent his executor from suing at law.

(R) So, on the other hand, if the representative of the mortgagee comes to foreclose, and the mortgagor cannot compel the re-conveyance of the estate by reason of the absence of the heir, or the loss or pawn of the title deeds or otherwise, no decree will be pronounced; and the executor of the mortgagee will be enjoined not to proceed at law on the bond or other collateral security until he can find the heir. *Schoole v. Sall*, 1 Sch. & Lef. 177. S. C. ante, p. 15, n. (L). But an instance of an irreciprocal mortgage is adduced in n. (S), ante, 136.

A steady attention to this mode of construction will explain the principles of the generality of the cases on this head.

Thus (*f*), where the defendant, being a mortgagee of the premises, afterwards purchased the same *for valuable consideration*; and the plaintiff, having the title of redemption, would, *before* he redeemed, have had the validity of the mortgage *tried at law*; the court, on reading precedents on the plaintiff's part, was of opinion, that the defendant being a purchaser for a valuable consideration, the plaintiff ought to declare whether he would redeem the mortgaged premises or not, before he endeavoured to avoid the title; it being against the rule of justice for the plaintiff to have the equity of redemption from the defendant after he had endeavoured so to do; and that, if he would redeem, he ought to pay the defendant all his principal money due thereon with damages and costs; which, he refusing to do, the court dismissed the bill.

Mortgagor, if he will not undertake to redeem, cannot try validity of mortgage;

And, where the mortgagor (*g*), being an infant, by his guardian had endeavoured to defeat the mortgagee and overthrow his title, and the mortgagee prevailed, the latter, on application to redeem, [by the former] having sworn he had paid a considerable sum more than his costs as taxed, was, on the account, allowed all he had expended; and the mortgagee having (under an apprehension that his mortgage would have been defeated at law,) got administration in the Spiritual Court as principal creditor, was allowed the costs expended there also (*s*).

and, in attempting to overthrow mortgage, must pay all mortgagee's expences in defending it.

(*f*) *Smith v. Valence*, 1 Rep. in Ch. 170. Et vide Cowp. Rep. 601. (*g*) *Ramsden v. Langley*, 2 Vern. 536.

(*S*) And where the second mortgagee brought a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor, the court held, that the costs which the first mortgagee had incurred should not be taxed, as in the case of an adversary suit; but that the first incumbrancer should be allowed his costs and charges as in the case of a solicitor who lays out money for his client; and that the profits of the mortgaged premises should be first applied to pay off those costs before they went to sink the principal. *Lomax v. Hide*, 2 Vern. 185; ante, 189, n. (Q). Et vide post, vol. ii. 991, where the modern decisions on the subject of Costs are introduced in the notes.

Second mortgagee redeeming first, must pay expences of first mortgagee in foreclosing.

Mortgagor admitted to redeem before day appointed for payment, but mortgagee cannot foreclose before that time.

So (h), although, generally, the mortgagee cannot compel the mortgagor to redeem before the time agreed upon, *videlicet*, the day appointed for re-payment of the money; yet, if a hard bargain be made against the mortgagor, he will be admitted to redeem before that time. Thus, where the plaintiff (i), being seised in possession of lands worth 15*l. per annum*, and of other lands in reversion subject to incumbrances, in 1657, in consideration of 320*l.*, demised those lands by deed and fine to the defendant for ninety-nine years at 5*l. per annum* rent, upon condition, that if the plaintiff, or his heirs, should pay the defendant 380*l.* in 1688, then the *conusees* of the fine should stand seised to the use of the plaintiff and his heirs; and the plaintiff covenanted for the defendant's enjoyment accordingly. Within a few years after this conveyance made, two old lives, on which the reversionary interest depended, happening to drop, the estate became 45*l. per annum*; and, in 1682, the plaintiff brought his bill to be admitted to redeem the premises, and to have an account of profits from the date of the deed, alleging that, though the deed was in that form, yet it was agreed between him and the defendant that it should be a mortgage, and redeemable at any time upon payment of 320*l.* and interest. And although there was no proof of any other agreement than the deed, and there was a bond to perform the covenants of the deed; and it appeared that the estate consisted chiefly in old buildings and a mill, and that the defendant had laid out above 100*l.* in repairs; yet, in regard the plaintiff's mother died within three years after the deed was made, whereby the revenue exceeded the interest of the money, the Lord Keeper, notwithstanding there was a contingency at the time of the deed, thought this an unreasonable bargain, and decreed an account of the profits *ab origine*, with redemption on payment of what the profits fell short of the 320*l.* and interest; and his Lordship appointed the same to be paid at a

Proviso for redemption presumed from inadequacy of price (T).

(h) *Newcomb v. Bonham*, 1 Vern. 268. 2 Vent. 198. 2 Ch. Ca. 158, 232. [S. C. 1 Vern. 7. 214. 2 Vent. and Com. Rep. 349.—Ed.]
365. 2 Freem. 67. Ante, 116 and (i) *Talbot v. Braddill*, 1 Vern. 183, 128. Et vide *Barrel v. Sabine*, 1 Vern. Ibid. 394.

(T) As to this, see ante, 125, n. (P).

day certain, not to expect till 1688, according to the condition of the deed.

The Court of Chancery will not allow a purchaser to oblige a mortgagee in possession to quit the estate to him, unless he will first pay him principal, interest, and costs (*k*) (*v*). *Mortgagee may retain possession till paid P, I, and C.*

If possession be obtained against a mortgagee by *fraud*, pending a suit, it must be restored before there can be any redemption (*l*). *Fraudulent possession taken from mortgagor.*

If part of an original mortgage be paid off (*m*), and then a further sum be borrowed by the same parties on a defective *Further charge must be paid though title defective.*

(*k*) *Dasy v. Barker*, 2 Atk. 2. [S. L. Ca. Abr. 599, pl. 20. [15 Vin. Abr. *Barn v. Hartpole*, 15 Vin. Abr. 466. 467, pl. 16. S. C. 2 Bro. P. C. 111. —Ed.] Et vide post, vol. ii. page 1008.—Ed.]

(*l*) *Lant v. Crisp*, Vin. Abr. tit. (*m*) *Rayson v. Sucheverel*, infra, [vol. ii. *Mortgage (T)* Ca. 16, p. 467. 2 Eq. p. 725. 1 Vern. 41. 2 Cha. Ca. 98.—Ed.]

(U) A mortgagee cannot be compelled to give up his securities until he has his money in his pocket. Where therefore an order had been obtained directing him to release the mortgaged premises, and give up the securities, on payment into court of the mortgage money, the amount of which was disputed, the Lord Chancellor discharged the order. *Postlethwaite v. Blythe*, 3 Madd. Rep. 242. Nor will a mortgagee in possession be deprived of that possession while any thing remains due; but if he refuses to swear that any thing is due, then he will be ordered to re-convey. *Quarrell v. Beckford*, 13 Ves. 377. *Mortgagee not compellable to give up securities till paid his money.*

The Lord Chancellor's judgment in the case of *Postlethwaite v. Blythe*, has since been more fully reported; the following are the material parts of it:—
“The rules of the court, with regard to mortgagees, have been strongly impressed on my mind by the conduct of two distinguished practitioners. Mr. Lloyd constantly protested that he never would, on the part of a mortgagee, consent to a sale; and the late Mr. Maddocks, who was himself a mortgagee for 20,000*l.* on a Welch estate, refused his concurrence in a sale, to the great dissatisfaction of Lord Thurlow. They both maintained, one on behalf of his client, the other, of himself, that the mortgagee was entitled, before he relinquished the estate, to have the money not in the hands of the accountant-general, but in his own. It was not till a late period, that it was contended that a mortgagee was bound to shew his mortgage deeds to a person contracting for the purchase of the estate. See *Anon.* Mos. 246. The mortgagor is entitled to say to the intended purchaser, that if he chooses to take his chance of title, he may, on payment of the mortgage-money, have a conveyance. The general doctrine of the court is, that if the party claiming to redeem will take the mortgagee's word for the sum due, and will pay it,

title, the last sum must be paid off, on redemption, as well as the first (x).

Money on one estate for more, and further charge on another for less than value, one estate not redeemable without the other.

Where the mortgagee first lent money to the mortgagor upon a particular tenement, and afterwards advanced him a farther sum on another estate (n): and the latter turned out more valuable than the money due, but the first mortgage was

(n) *Pope v. Onslow*, 2 Vern. 286. *den*, 2 Ves. 377. 1 Vern. 29. 245. *Margrave v. Le Hooke*, *ibid.* 207. doubted *Ex parte King*, 1 Atk. 300. *Cator v. Charlton*, and *Collett v. Mun-*

the mortgagee must convey; but when the mortgagee states a certain sum to be due, the court will not order him to re-convey on payment of that sum into court; placing him in the situation, that if that sum is more than sufficient to satisfy his demand, he shall not have the surplus; if not sufficient, he shall have only personal security for the difference." *Postlethwaite v. Blythe*, 2 Swanst. 257.

In another case his Lordship said, it is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. A party coming to redeem a mortgaged estate, must prove, at his own costs, that he is the individual entitled to the equity of redemption, *James v. Bian*, 3 Swanst. 237.

(X) See the same law in *Purefoy v. Purefoy*, 1 Vern. 29.

Priority of redemption where first mortgage is defective.

If a man mortgage lands by a defective conveyance, and afterwards mortgage to a second person by an assurance, which is good and effectual with notice, the second mortgagee shall prevail, because he has the security which carries the legal title; and equity will not interpose when both are equally on a valuable consideration. But if a man mortgage by a defective conveyance, and there are subsequent creditors whose debts do not originally affect the land, equity will supply such defective conveyance against such subsequent incumbrancers who acquired a legal title afterwards; for since the subsequent creditors did not originally take the lands for their security, nor had in view an intention to affect them, when afterwards the lands are affected, and they come in under the very person who is obliged in conscience to make the defective security good, they will be held to stand in his place, and will be postponed to such defective conveyance. Per Sir Heneage Finch, Lord Keeper, 1 Eq. Ca. Abr. 320, pl. 1. and see similar law, post, 528. 530; but observe the notes there for important qualifications of the Lord Keeper's law.

Legal and equitable title preferred to equitable title only.

If the inheritance of land mortgaged for a term be conveyed by a defeasible but equitable title, and afterwards conveyed to another by a legal and equitable title, the latter shall have the benefit of the equity of redemption, per Parker, Lord Chancellor, in *Hagshaw v. Yates*, 1 Stra. 240.

deficient in point of value, the court would not suffer the one estate to be redeemed without the other (y).

So, if a man makes two several mortgages of distinct lands, and then dies (o), and his heir *endeavours* to defeat the mortgagee of one of the estates, by setting up an entail, and afterwards applies to redeem, he shall redeem both or neither (z). Heir must redeem both estates, or neither,

(o) *Margrave v. Le Hooke*, 2 Vern. 245. Max. Eq. 65, 66. 2 Ves. jun. 207. 1 Eq. Ca. Abr. 325. 7. 1 Vern. 376, 377.

(Y) In like manner it was holden in *Shuttleworth v. Laycock*, 1 Vern. 245, *Text confirmed.* where A. had two mortgages on different independent estates of the mortgagor, one a deficient security, and the other more than sufficient, that the mortgagor could not redeem the latter without making good the deficiency of the other security. The same doctrine was acknowledged in *Purefoy v. Purefoy*, 1 Vern. 29. The authority of *Pope v. Onslow* was questioned by Lord Hardwicke, in *King Ex parte*, 1 Atk. 300; but perhaps without reason. The Master of the Rolls in *Jones v. Smith*, cited *infra*, and in the next note, recognized it as a standing authority; and the subsequent decisions have fully confirmed the principles on which that determination was founded.

It is proper in this place to apprise the student, that the rule preventing a redemption by piece-meal applies only where the same person is entitled to the equity of redemption on both estates. If, therefore, A. and B. join in the mortgage of one estate to C., and afterwards A. mortgages another estate to the same mortgagee, B. may redeem the estate in which he has a joint equity of redemption, without being obliged to redeem the other estate also. *Jones v. Smith*, 2 Ves. jun. 376. One tenant in common may redeem, though the other has mortgaged a second estate.

(Z) This rule does not depend on the attempt to defeat the estate of the mortgagee, nor is it a rule confined to redemptions by the heir only; it holds equally in reference to a mortgagee and purchaser.

1st. With respect to a mortgagee of the equity of redemption, it is observable that the original mortgagee is not to be entangled with any questions which may arise between the subsequent mortgagees. He has a right to be redeemed entire, and not by parcels. 9 Mod. 396. "His right," observed Lord Hardwicke, in *Titley v. Daris* (15 Vin. Abr. 447), "undoubtedly stood so with regard to the mortgagor, and consequently with regard to the subsequent mortgagees; for the mortgagor could not hurt him by placing his right in another's hands, nor was there any precedent where such a redemption was ever allowed, and therefore his Lordship was of opinion, that if A. mortgaged two estates, viz. Black Acre and White Acre, to B., and afterwards mortgaged Black Acre to C., and after that White Acre to D., the court could not decree a redemption of B.'s mortgage by proportionable contributions of C. and D.; for if a man mortgaged all his estate to one person, he might, it was true, split it into ten puisne mortgages more; but if all these subsequent mortgagees should have a right to redeem, on payment of proportionable contributions, it would be impossible for the first mortgagee to come at his right till all those proportions were settled, which might and generally did take a Second mortgagee redeeming, must take both mortgages or neither.

except where he claims by purchase, and not by descent, e. g. as tenant in tail.

But this rule holds not when the heir claims by purchase, and not by descent. Thus, where A. and B. (*p*), tenants for

(*p*) *Bromley v. Hamond*, 2 Ch. Ca. 23.

And estate not originally comprised in his mortgage, becomes chargeable with his debt.

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First mortgagee foreclosing must be redeemed entire.

Purchaser of equity of redemption must redeem mortgages on both estates, or neither.

great deal of time, and often produced trials at law, and after all, there ought to be so many different redemptions and times given for them (either half years or quarters), before the first mortgagee could come at his money, or obtain a foreclosure, which appeared to his Lordship to be very inconvenient, and productive of great discredit to this kind of security by mortgage.

In this case, if C. had redeemed the original mortgage, he would have been entitled to hold both estates (though Black Acre only was comprised in his own mortgage) till he had been repaid all that he had disbursed in discharge of B.'s mortgage, and likewise all that was due to him on his own mortgage, and D. would not have been admitted to redeem him but on those terms; for C. could not have redeemed B. but by an entire redemption of all that was in mortgage to B., and having so done, he stood in B.'s place, and had the same right as he had, viz. to be redeemed entire, both as against the mortgagor and as against D. the subsequent mortgagee; and although by a redemption of this kind, White Acre, which was not comprised in C.'s mortgage, would have become charged with his debt, yet, said the Chancellor, in *Tilly v. Davis*, ubi supra, it was no new thing for a man, by a subsequent accident (as by payment of money), to gain lands as a security for his debt more than he contracted for, and which otherwise would not have been liable to it; and his Lordship mentioned the case of *Bovey v. Smith*, 1 Ch. Ca. 124, 201, and *Acton v. Peirce*, 2 Vern. 480.

So, in the case of *Fribourg v. Lord Pomfret*, at the Rolls, 16th July, 1773, Amb. 733, the plaintiff had two distinct mortgages on two different estates, secured by separate instruments, and Lord Pomfret had a second mortgage on one of the estates only. The plaintiff filed a bill of foreclosure against the mortgagor and subsequent incumbrancer, who applied to redeem the estate of which he had the second mortgage. But Sir Thomas Sewell, M. R. decreed that Lord Pomfret must redeem the mortgages on both estates, or stand foreclosed.

2dly. The rule is equally applicable to a purchaser of the equity of redemption who applies to redeem, as to the heir or second mortgagee. 2 Ves. jun. 376. Thus, in the case of *Carter Ex parte*, Amb. 738, where a bankrupt had made two separate mortgages of two different estates to the same person, and afterwards sold the equity of redemption of one of them to the petitioner Carter. A commission being taken out, Carter petitioned that he might redeem the mortgage on the estate which he had purchased. But the petition was dismissed, without prejudice however to the petitioner's right to bring a bill, which would have been the proper mode of proceeding. Nothing more appears of the case but from the authorities cited, and the arguments of counsel, it appears to have been admitted by the court, that where there are two separate mortgages of different estates to the same person, a purchaser of the equity of redemption of one of them cannot redeem that mortgage only, but if he redeems at all, he must redeem both. This is the principle deduced from it by Mr. Wooddeson, in his Lectures (vol. ii. p. 160), and by the coun-

life, remainder to their son in tail, mortgaged the lands so settled, A. died, and afterwards the mortgagee, finding his

see, *atq^o* in *Bitch v. Ellames*, 2 Austr. 488. In the latter place, the rule is supported under the doctrine of notice, thus:—If A. mortgages two estates to B. by separate conveyances, and afterwards sells one of them to C., without informing him of the mortgage of the other estate, yet as A. could not redeem the one estate without redeeming the other, so neither should C.; for notice of the one mortgage to B. is constructive notice of the whole equity, which by proper inquiries he ought to have made himself acquainted with; citing *Carter Ex parte*, Amb. 733. The rule in this shape assumes something of an arbitrary cast, but it is too well settled to be shaken. In *Ireson v. Denn*, 4 Cox's Ca. Ch. 425, the Master of the Rolls said he did not know why such a rule was ever laid down, but it had been decided by many cases, that a mortgagee of two distinct estates, upon distinct transactions, from the same mortgagor, was entitled to hold both even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage, until payment of the whole money due on both mortgages, and his Honor thought the parties interested in the equity of redemption of the mortgage on the second estate, were necessary parties to a suit instituted by the purchaser of the equity of redemption of the first estate, to redeem both mortgages.

Reason of rule.

3dly. The same rule is applicable where the mortgagor, or those claiming under him, tender to the mortgagee his principal, interest, and costs, under the statute 7 Geo. 2. c. 20, cited and commented on ante, 168 to 170. If the mortgagee have other mortgages than the one which supports his ejectment, and the mortgagor moves to stay proceedings, on payment of principal, interest, and costs, it is optional with the mortgagee whether he will submit to be redeemed as to that one mortgage only, without being redeemed also as to the mortgages on the other estates. In *Roe v. Soley*, 2 Wm. Black. Rep. 726, it appeared that, in 1763, one Fowles assigned the premises in question to Bowland, to secure 149*l.* with interest. In 1766, Bowland assigned, by way of under mortgage, to J. S. to secure 100*l.* and interest; and in 1768, Bowland and J. S. assigned to Kaye, the lessor of the plaintiff, to secure 114*l.* 6*s.* 6*d.* There were also two other mortgages from Bowland to Kaye, of different premises, the one to secure 525*l.* and the other 200*l.* with interest. Bowland became bankrupt, and all his estate and effects were duly bargained, sold, and assigned to Soley the defendant, who thereby became the under mortgagor of the estate in question, and also mortgagor of the said two other estates for the sums above stated; the lessor of the plaintiff uniting the character of mortgagee as to the three different mortgages. Kaye then commenced an action of ejectment against Soley for the premises, being the property which was conveyed by Fowles to Bowland the bankrupt in mortgage as aforesaid, and assigned by him to Kaye, as before stated. The defendant moved to stay proceedings, on payment of the 114*l.* 6*s.* 6*d.* principal, interest, and costs, and to be permitted to redeem that mortgage only. Kaye, on shewing cause, insisted, that all should be redeemed or none; especially the third mortgage for 200*l.* which he apprehended to be a scanty security. And

Under-mortgagor moving to stay proceedings on stat. Geo. 2, compelling to redeem that mortgage, and others.

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security bad, gave a third person a premium to procure the son, *tenant in tail*, to borrow a farther sum on mortgage, and

the court refusing to compel a redemption of the first mortgage only, discharged the rule, with costs. But Fowles, the original mortgagor, might, it is presumed, have redeemed his mortgage, without paying Kaye what was due to him from Bowland on the security of Bowland's own property.

Rule holds, though one mortgage be a pledge of personalty, and the other a mortgage of realty.

4thly. It is further observable, that the rule holds, notwithstanding one mortgage consists of a pledge or deposit of personalty, as bills of exchange or promissory notes, and the other of a mortgage of realty. A question as to this point was discussed in *Jones v. Smith*, 2 Ves. jun. 376, and it was at first decreed otherwise; but afterwards, on appeal to the House of Lords, that decree was reversed, 6 Ves. 229, n. (d), on what grounds we are not informed, but perhaps on the doctrine of tacking, which forms the basis of the rule under consideration. When the cause came on at the Rolls, Lord Alvanley considered the pledge of personal securities for a certain specific debt, as totally distinct from a mortgage of real property for another debt, and on that ground decreed a redemption of the personal securities, without discharging what was due on the mortgage. His Lordship, however, acknowledged the general principles, and remarked, that if two separate estates were mortgaged, by which he understood the legal interest absolutely, and at common law irredeemably conveyed, a court of equity would not interpose in favor of the redemption of one, without the redemption of both. *Pope v. Onslow*, followed by two modern cases, had settled the point, that as against the mortgagor, or his assignee, and therefore Lord Alvanley supposed, as against all his creditors, if there were two legal mortgages, which at law were become absolute (for that must have been the principle), the mortgagee might insist on being redeemed, as to both, or neither. The two modern cases were those of *Cator v. Charlton*, 21st June, 1775, and *Collett v. Munden*, 31st May, 1786, which his Lordship said amounted to this, that if a man makes a mortgage, and afterwards makes another mortgage for another sum, and then assigns the equity of redemption of one, both must be redeemed, and the case of the assignee is not better than that of the original mortgagor.—This is now the established doctrine of the court. But,

Rule holds no longer than both mortgages continue united in the original mortgagor. (Sed qu.)

5thly. The principle, that where two distinct estates are mortgaged for two distinct debts to one person, a separate redemption cannot be decreed, operates only as long as the original mortgages remain united in the same person. Thus if a mortgagee, having two distinct mortgages on two separate estates, assigns one mortgage to a third person, or if two mortgages originally made to two different persons, come together by assignment to one assignee, the rule will not, it seems, apply. *Argo. Willie v. Lagg*, 2 Eden Rep. 78.

The reason why this rule is allowed to prevail in any case is, because, if the mortgagor applies for equity, he must do equity, and his general estate being liable to both mortgages, the Court of Chancery (which is the only place the mortgagor can obtain relief after forfeiture), will not be instrumental in taking illegally from the mortgagee that by which he may be defrauded of part of his debt. If he assigns one mortgage over to a third person, the reason of the rule ceases. But if at a subsequent period the two mortgages become united

then took an assignment from the last mortgagee; the first mortgagee, on application to redeem, insisted, that having now gained a good title at law to the lands, tenant in tail

again in an assignee, then it is presumed the rule would revive. There is, however, a shade of difference between this last case and the one secondly proposed. If White Acre be mortgaged to A. and Black Acre to B., and both assigned to C. it may be contended, that since the rule was inapplicable before assignment, it must be equally so after, for that a derivative case could not engender a rule which did not apply originally. But the reason why it did not apply originally, was because the case was very differently circumstanced, and the court (which aims at substantial justice), would not, it is conceived, permit the mortgagor to use this flimsy argument to defraud the assignee of both mortgages, but would rather allow him to tack each debt respectively to the other mortgage. The non-application, therefore, of the rule to the case where two mortgages, originally distinct, become united in one assignee, must be questioned.—It merely remains to add here, that Lord Northington, in the case of *Willie v. Lugg*, ubi supra, has observed, that “the principle on which the court proceeds subsists as long as the equity of redemption remains united;” and immediately before, that “if a person makes two different mortgages of two different estates, the equity reserved is *distinct* in each, and the contracts are *separate*, yet if the mortgagor could redeem one, he cannot.” Subsequently he observes, “if you come to redeem separately, you come for equity without doing equity; paying a debt in lieu of which the mortgagee can hold both your estates, until this court interposes.” But what follows is contradictory to all the authorities:—“There seems also a manifest distinction between this case and the case of a purchase subject to a mortgage; for there the purchaser acquires a right to redeem that particular mortgage, and when he comes to redeem, he offers in equity to pay all that his estate is debtor for.”

6thly. In cases of this description, it may perhaps be necessary to make a distinction between a foreclosure and a redemption. In the former case, if a mortgagee, having two mortgages of two distinct estates, prefers a bill to foreclose the equity of redemption of one of them, he will not be obliged to foreclose the equity of redemption of the other. But in the latter case, if a mortgagor brings a bill to redeem one mortgage, he must, if the mortgagee chooses to insist on it, redeem both, or neither.

Distinction as to this rule between foreclosure and redemption.

7thly. It is proper to add, that by a decree at the Rolls, in Easter Term, 1807, in the case of *Waugh v. Land*, Coop. 150, it was declared, that the plaintiff (who with one Price his co-tenant in common, had mortgaged the premises in question to the defendants), was entitled to redeem his moiety of the said mortgaged premises, and the usual accounts were directed accordingly. This decree, it is presumed, must have proceeded on the ground that the mortgagees were consenting to be redeemed of a moiety only; and there are several features in the case which favor this presumption. The fact is neither affirmed nor denied on the report. The contrary supposition would be in the teeth of the decided cases.

One tenant in common must redeem whole mortgage if required. Semb.

should redeem both mortgages or neither: but the court held the son to be a stranger to the father as to the estate tail, and decreed a redemption on payment of the last sum borrowed, with costs (A).

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Two estates
mortgaged to A.
one to B., A.
shall take his
whole money
out of estate
not mortgaged
to B.

But if a person, who has two real estates (q), mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice (B) of the first, a court of equity, in order to relieve the second mortgagee, will direct the first to take his satisfaction out of that estate only, which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descend to two different persons; and this is done upon a constant equity, that if a creditor has two funds, he shall take his satisfaction out of that fund, upon which a creditor has no *lien* (C).

(q) 2 Atk. 446.

Case in oppo-
sition to doc-
trine in text.

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(A) The case of *Margrave v. Le Hooke*, 2 Vern. 207, is directly opposed to this of *Bromley v. Hamond*. It must be left to the learned reader to decide between the two. In *Margrave v. Le Hooke*, the plaintiff's bill was to redeem a mortgage made by his father to the defendant, who by answer insisted, that the plaintiff's father had made him two several mortgages of several lands; that the plaintiff endeavoured to defeat him of one of those mortgages by reason of an entail, and hoped that in equity he should redeem both or neither. *Per Cur.*—He shall redeem both or neither; and so, if one mortgage had been deficient in value, and the other mortgage had been worth more than the money lent upon it, the heir should not have been admitted to redeem the one without the other.

(B) It is difficult to discover how notice could have affected this case.

Application of
doctrine in text.

(C) S. R. post, vol. ii. page 1014. But this rule of equity cannot be applied in aid of one claimant, so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against land devised, though he shall as against land descended. *Hene v. Meyrick*, 2 Salk. 416. S. C. 1 P. Wms. 201. *Clifton v. Burt*, ibid. 679. *Hazlewood v. Pope*, 3 P. Wms. 324. *Scott v. Scott*, Amb. 288. But such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets to be satisfied out of the mortgaged premises, though specifically devised. *Lutkins v. Leigh*, Ca. Temp. Talb. 54. *Forrester v. Lord Leigh*, Amb. 171. For the application of the personal assets, in case of the real estate mortgaged (vide *Howell v. Price*, 1 P. Wms. 294,) does not take place to the defeating of any legacy. *O'Neal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 730. *Davis v. Gardiner*, 2 ib. 190. *Rider v. Wager*, ib. 335. And it is to be observed, that the rule above mentioned

A mortgage being assignable (r), a purchaser shall hold it against *the mortgagor or his heirs* for the sum due on the ^{Assignee of mortgages entitled to whole money due,}

(r *Williams v. Springfield*, 1 Vern. 476. 1 Salk. 155, 4.

does not subject any fund to a claim to which it was not before subject, but only takes care that the election of one claimant shall not prejudice the claims of the other. 2 Atk. 438. 1 Ves. 312. As to claimants on particular funds, the general rule is as stated in *Robinson v. Gee*, 1 Ves. 252, that where there is a mortgage of land, with a covenant for payment of the money, *that makes it a debt on the personal assets*, which are to be applied first in exoneration. And it is observable, that simple contract creditors and legatees will be entitled to come on the mortgaged premises *pro tanto*, if the personal assets are exhausted by the mortgage; but an executor or residuary legatee will not be entitled to stand in the place of the mortgagee for so much as is drawn out of the personal estate, in the same manner as pecuniary creditors and legatees are allowed to do. *Ibid.*

In a manuscript case of *Robinson v. Tonge*, 15th October, 1739, cited by Mr. Coxe, in the latter end of his note to 1 P. Wms. 680. A. being seised of freehold and copyhold lands, mortgaged the same in his life-time, and died indebted by mortgage, and on several bonds. The specialty creditors insisted that the court, in marshalling the assets, should cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate. But the court said, that copyhold estates were not liable, either at law or in equity, to the testator's debts, further than he subjected them thereto, and ordered that the copyhold estate should bear its proportion with the freehold estate in payment of the mortgage, and that it should not be liable to make satisfaction for the specialty debts. Reg. lib. B. 1738, fol. 483. The authority of this case was discussed in *Aldrich v. Cooper*, 8 Ves. 382, and over-ruled with great clearness by Lord Eldon, who stated himself to be much surprised when he first heard it cited. Supposing there had been no freehold estate, it was clear, Lord Eldon observed, that the mortgagee having two funds (the copyhold and personal estate), he might, if he pleased, have resorted to the copyhold estate. But would the court compel him to that choice? If it would, the court marshalled the funds by the necessary consequence of its act, though technically the term "marshalling" was applicable to assets only; if it would not, it was then purely a matter of the mortgagee's will, whether the simple contract creditors should be paid or not, which was contradictory to all the authorities, and the established rule (not applying to assets particularly), that if a party has two funds, a person having an interest in one only, has a right in equity to compel the former to resort to the other. And his Lordship said, he never understood the rule, that if A had two mortgages, and B. had one, the right of B. to throw A. on the security which B. could not touch, depended on the circumstance, whether it was a freehold or copyhold mortgage. A surety might have the benefit of a mortgage of a copyhold estate exactly as of a freehold. A simple contract creditor had no manner of lien on the freehold estate. How was it then that he was allowed effectually to apply it for his

Simple contract creditors entitled to stand in place of mortgagee (of freehold and copyhold), exhausting personal assets.

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though he purchased for less (D).

mortgage, although he bought it for less than was due; or for less than it was worth; for he stands in the place of the mortgagee who assigned, and who might have given it to him *gratis*. And what was due will be the measure of allowance, not what was given, for that might be more than it was worth

satisfaction? It was not on the ground of assets, either by will or by contract *inter vivos*, but on the ground that the specialty or mortgage creditor having two funds should not at his pleasure resort to a fund which would disappoint a just creditor, who had not another fund to resort to. The principle in some degree was, that it should not depend on the will of one creditor to disappoint another. Then, what was the distinction as to the copyhold estate? The question was, whether the debtor had not subjected the copyhold estate to the extent of the mortgage imposed on it; whether he had not decided that his property to that extent should be liable to some debt? And the court would extract this further principle, that a creditor who could make it liable to that extent should not by his will defeat another, the former having two funds—the latter only one. There was no more a lien on the freehold estate than there was on the copyhold estate: and the court had said, and the principle was repeated very distinctly in the *Attorney-General v. Tyndall*, Amb. 614, that if a creditor have two funds, the interest of the debtor shall not be regarded; but the creditor having two funds shall take to that which paying him will leave another fund for another creditor. Copyhold estates were not chargeable with debts; neither were freehold estates chargeable with simple contract debts; but the copyhold estate in question was expressly charged with a debt: and if freehold estates were applied to simple contract debts, because charged with another debt, why were not copyhold estates to be applied in discharge of those debts under similar circumstances? And the mortgagee's having only an equitable estate in the copyhold premises, by means of the covenant to surrender, could make no difference; for the securities were to be looked on as giving the mortgagee a legal estate in the freehold, and an equitable estate in the copyhold; thereby giving him recourse to two funds for the payment of his debt. Lord Eldon then went into a comparison of this with a variety of other cases, and concluded by observing, that the case of *Robinson v. Tonge* was not reconcileable with the general classes of cases; and therefore as to the case in question, if it were necessary for the payment of the creditors, the mortgagee should be compelled to take his satisfaction out of the copyhold estate, or if he took it out of the freehold estate, those who were thereby disappointed should stand in his place as to the copyhold estate.

Mortgagee may stand in place of Crown, extending his security.

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In like manner a mortgagee, whose interest in the estate is affected by an extent of the crown, will in a question with the general creditors, be held entitled to stand in the place of the crown as to those securities which he could not affect *per directum*, because the crown affected those in pledge to him. *Aldrich v. Cooper*, ubi supra.

(D) This is good law, see next note; and as to the doctrines of tacking and priority, see Chap. XIII. *infra*.

as well as less ; and he that runs the hazard if a loss happens, ought to have the benefit in case it turns to advantage. Thus, where A. mortgaged his lands to B. (s), and C., a stranger, bought the interest for less than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the question was, whether C. should be allowed more than he actually paid ? And the Lord Chancellor said, that this case had neither point nor edge, for there was no colour why, when the heir came to redeem, he should not pay the whole money due on the mortgage : for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himself (E).

(s) *Philips v. Vaughan*, 1 Vern. 336. *Baker v. Kellet*, 3 Rep. Ch. 23. S. C. Nelson, 117.

(E) But Lord Chancellor Jefferys added a very essential qualification to the case of *Williams v. Springfield*, namely, that where there were any subsequent incumbrancers or creditors in the case, a man who bought in a prior incumbrance should be allowed against other incumbrancers or creditors only what he really paid, though there were in truth a greater sum due. Lord Hardwicke, in *Morret v. Paske*, 2 Atk. 54, thought this rule too general ; and held (without any reference to the interest of the subsequent creditor or incumbrancer), that an agent, trustee, heir at law, or executor, purchasing a *puise* incumbrance, as against another incumbrancer should be paid no more than what he gave for this incumbrance ; otherwise as to a prior creditor, who *bonâ fide* bought in a *puise* incumbrance, though he did not give the full value for it. This was quoted by Mr. Vesey, in the 5th vol. of his Reports, p. 620, n. (a), as the standing rule in that day (1800), and nothing has since occurred to lessen its authority. Mr. Maddocks has adopted Lord Jefferys' doctrine in the last edition of his *Treatise on Equity*, vol. i. p. 525, which must now be considered as considerably shaken, if not entirely over-ruled. The more equitable maxim would perhaps be, that a person buying in prior incumbrances with notice of specialty creditors or subsequent incumbrancers, should as against such creditors or incumbrancers be allowed only what he gave for the prior charge, and not what was really due.

But although a trustee, agent, heir at law, or executor, purchasing a mortgage, will not be allowed more than they actually paid ; yet if they purchase for the purpose of protecting a subsequent incumbrance to which they are entitled in *their own right*, they may take the full benefit of a prior security. *Darcy v. Hall*, 1 Vern. 49. There are several old cases in Vernon's Reports on this subject, most of which are cited by the Author in the ensuing pages. *Ascough v. Johnson*, 2 Vern. 66, is however omitted. The court there held, that if a purchaser or mortgagee buy in incumbrances to protect his

Person purchasing incumbrance allowed whole money. Secus, if he be trustee, agent, heir, or executor, of mortgagor.

Except where he purchases to cover his own incumbrance.

But heir purchasing prior incumbrance shall, as against subsequent incumbrancer, be allowed no more than he really paid.

But where a man dies in debt, and under several incumbrances (*t*), namely, judgments, statutes, mortgages, &c. and the *heir at law* buys in any of them that are of the first date; if creditors, who have the latter securities, prefer their bill, the incumbrances, bought in, shall not stand in their way for more than the heir really paid for them. For a creditor has equal equity with a purchaser, and the taking away the gain of the latter to supply the loss of the former, is making both equal; and therefore the gain the heir would make if the whole money due on the incumbrance were allowed him, shall be taken from him to make up the loss of the other incumbrances upon the estate.

Nor shall heir, trustee, executor, or agent, compound mortgages.

So, if an heir at law, trustee, executor, or agent (*u*), compound debts or mortgages, and buy them in for less than is due upon them, he shall not take the benefit of it himself, but the creditors and legatees shall have the advantage of it; and, for want of them, the benefit shall go to those entitled to the surplus.

Mortgagee buying dower, heir on redemption entitled to it.

And where a mortgagor in fee died (*x*), and the mortgagee bought in the mortgagor's wife's dower, it was decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid.

(*t*) 2 Vent. 353. 1 Vern. 49. 476. 1 Eq. Ca. Abr. 330. 3. *Anon.* 1 Salk. 155, 4.

(*u*) *Darcy v. Hall*, 1 Vern. 49. 1 Salk. 155. 4. 2 Atk. 54.

(*x*) *Baldwyn v. Banister*, 3 P. Wms. 251, note A.

estate at law on compositions (to wit), incumbrances on his purchased lands and other lands, he shall be allowed the full money due on such incumbrances, and the same shall not by the heir or mortgagor be redeemed without full payment of all the money due on such incumbrances, without regard to the beneficial bargains and compositions made by such purchaser.

Instance of heir being allowed whole money.

The case of *Darcy v. Hall*, ubi supra, affords an instance where the heir, through some special circumstance, was allowed on account the whole money due on the incumbrance he had purchased, though he had paid less than the whole money for it. Et vide Francis's Maxims, M. 3, p. 9; and *Price v. De Burgh*, 13th Nov. 1791, Rolls.

In the case of *Bishop v. Sharpe* (*y*), one as a guardian to an infant, took in an assignment of a mortgage; and the Lord Keeper, it is said, was of opinion, that as to the profits received out of the mortgaged lands, the guardian should be taken to be in possession as mortgagee, and not as guardian. But the reporter puts a *quære*; and the law seems to be otherwise (*z*); for where a guardian compounded debts, it was decreed, it should be for the benefit of the infant, and that case turns upon the same principle as that by which the case of *Bishop v. Sharpe* must be governed.

Guardian purchasing mortgage, it will be for benefit of ward.

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And the equity seems to be the same if a stranger purchase (*a*), as against incumbrancers, creditors, or real purchasers. Thus, on a Master's special report (*b*), to whom the account in question was referred to be taken, it was determined by the court, that an heir, or *any other person*, should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he paid for it, without regard to what was actually due thereon.

Stranger allowed no more than he paid, as against other creditors and bona fide purchasers (*F*).

If an heir purchases in an incumbrance on an estate charged with portions to younger children (*c*), he shall be allowed no more than what he really paid for it. But if an heir or trustee buy in incumbrances to protect others, to which he is himself entitled (*d*), the whole money due shall be allowed on account, although it was purchased for less.

Heir allowed to take whole debt, if he has other incumbrances.

(*y*) *Bishop v. Sharpe*, 2 Vern. 471.

(*b*) *Long v. Clopton*, 1 Vern. 464.

(*z*) *Powel v. Glover*, 3 P. Wms. 251, note A.

(*c*) *Brathwaite v. Brathwaite*, 1 Vern. 335.

(*a*) *Williams v. Springfield*, 1 Vern. 476.

(*d*) *Darcy v. Hall*, 1 Vern. 49.

(*F*) This rule is now exploded. An assignee of a mortgage, who purchases for less than the amount due, will be entitled to the full benefit of his purchase, except he be a trustee for the owner of the estate, or the guardian, executor, or heir at law of such owner; but even these persons may take the full benefit of the bargain, if they purchase out of their characters of guardian, executor, or heir at law, for the purpose of protecting a subsequent incumbrance of their own. See ante, 345 *a*, n. (*E*).

Doctrine intext exploded.

Of tacking debts to mortgage.

If the mortgagor became indebted to the mortgagee, on other account as well as upon mortgage (*e*), according to the former practice, it seems that the latter debts, as well as the former, must have been discharged before the mortgagor was entitled to a decree to redeem; for, the condition being broken, the estate of the mortgagee became absolute at law; and the mortgagor, being obliged to apply to equity to help him, having no remedy at law, was required to do equity to the party against whom he applied to be relieved in equity.

Mortgages may tack bond to his mortgage;

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Thus, where the plaintiff made a mortgage to the defendant (*f*), and afterwards the mortgagee advanced and lent more money to the plaintiff on his bond, the mortgagor, *on his bill to redeem*, was not permitted so to do without paying both debts, although there was no special agreement proved that the land should stand as a security for the bond debt. And in an *Anonymous* case, 3 Salk. 84, it is said to have been decreed by Somers, Lord Chancellor, that where the mortgagee lends more money upon bond, the mortgagor shall not redeem till he pays the bond debt, as well as the money due on mortgage.

only against heir, not against mortgagor,

to avoid circuity of action.

But the modern cases have altered the law on this subject; for in the case of *Lowthian v. Hassel*, 3 Bro. Rep. Chan. 162, Lord Thurlow is stated to have said, that the court had never been in the practice of suffering a mortgagee to tack his bond to his mortgage *in any case* but as against the heir of the mortgagor, to prevent circuity of action. And his Honor, in the case of *Jones v. Smith*, 2 Ves. jun. 376, appears to consider it now to be the rule that a bond cannot be tacked *even* against the mortgagor. Et vide *Hamerton v. Rogers*, 1 Ves. jun. 513, the point so determined in respect to creditors of the mortgagor under a deed of trust of the equity of redemption. Et vide 2 Ves. 662 (*g*).

(*e*) Vide Gilb. Rep. Eq. 104. Pre. *Anonymous* case, 3 Salk. 84, pl. 7. Chan. 419. Eq. Abr. 324. *Price v.* 2 Eq. Ca. Abr. 603, pl. 34. S. L. *Fastnedge*, Amb. Rep. 685. *Halliby v. Kirtland*, 2 Ch. Rep. 361.

(*f*) *Baxter v. Manning*, 1 Vern. 244.

Synopsis of cases on tacking bond to mortgage.

(*G*) In *Shuttleworth v. Laycock*, 1 Vern. 245, S. C. ante, 339, n. (*Y*), it was held by Lord Keeper Guildford, that if a mortgagee lend more money to the

The principle laid down by Lord Thurlow seems to have

mortgagor on bond, his heir shall not be allowed to redeem without paying off the bond as well as the mortgage, *provided the heir be bound by the bond*. So per Lord Macclesfield (Chancellor) in *Coleman v. Winch*, 1 Pr. Wms. 775, the bond of the ancestor, wherein the heir is bound, becomes, upon the ancestor's death, the heir's own debt, for which he is suable in the *debet et detinet*, and therefore if he comes to redeem the mortgage made by his ancestor, he must pay the debt by bond as well as the debt by mortgage, but though this be the debt of the heir, it cannot be said to be due from the *heir's assignee, the bond being no lien on the land*; which appeared most plainly, in that it was no lien on the land even against the mortgagor himself, who happened to be indebted to the same person by mortgage and by bond. Suppose also, added Lord Macclesfield, one to be indebted to A. by mortgage of a term for years, and also indebted to him by bond, if on the death of the mortgagor, his executor bring a bill to redeem the mortgage, he must pay both. In the case of *Monger v. Kett*, 12 Mod. 559, it was held, that if A. mortgage lands to B., and at the same time A. owes B. 100*l.* by contract or bond, A. shall be admitted to redeem without paying the 100*l.* by the contract or bond; to recover that the mortgagee will be left to his remedy at law. In like manner it was held, in *Challis v. Casbern*, Pre. in Ch. 407, (sed vide contra *Bingham v. Gregg*, Barn. 182. *Felton v. Ash*, ibid. 177), that a mortgagor, who borrows more money from the mortgagee on his bond, shall redeem without paying the bond debt, but his heir cannot; neither can the devisee of the equity of redemption since the statute against fraudulent devises. In a case which occurred at common law, *Archer v. Snapp*, Andr. 341. S. C. 2 Stra. 1107, it was held, that a purchaser of the equity of redemption was entitled to stay proceedings in an action of ejectment brought by the mortgagee on paying the mortgage debt, and without paying a bond debt, due by the mortgagor to the mortgagee before the purchase, and whereof the purchaser had actual notice. And it was resolved by the court, that where an estate is mortgaged, and afterwards more money taken up by the same person on bond, the mortgagor will not be obliged upon such an application as the one before the court, namely, to stay proceedings in an action of ejectment, to pay the bond debt, because in his hands it will not be any lien on the lands as a judgment would be [as to this see *Penson v. Plunket*, 2 Atk. 292. *Herbert Ex parte*, 13 Ves. 183. & 1 Sch. & Lef. 152]; for if he were obliged to pay the bond debt, by the same reason he would be obliged to pay the simple contract debts. But in such a case the heir would be obliged to discharge the bond debt, as well as the money due on the mortgage, in order to prevent circuity of action. And the court said, the purchaser stood in the situation of the mortgagor, against whom tacking would not be permitted, and the purchaser having retained money to satisfy the bond, made no difference, for that a court of law would act in this case according to the rules of a court of equity, where a redemption was constantly decreed upon payment of the mortgage money only; and it was said to have been so held in *Wood v. Mortimer*, Hil. 11 Geo. 2. in B. R. and in 1 Eq. Ca. Abr. 325.

The next case is that of *Powis v. Corbet*, 3 Atk. 556, where the mortgagee, Mrs. Kynaston, who was likewise a bond creditor, insisted, by her counsel, Lord Hardwicke's three cases.

Synopsis continued.

Heir's assignee.

Purchaser of equity of redemption.

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been recognized *previously* by Lord Harcourt (g) in the following case.

(g) *Cannon v. Pack*, 2 Eq. Ca. Abr. 226. 6 Vin. Abr. 222. 6.

Synopsis continued.

that she had a right to tack the bond to the mortgage, as against the heir, because assets being descended, he could not redeem one without paying off the other; for that the court would not make a circuitry by putting her to the necessity of suing on the bond; and she insisted further, that the rule was the same with regard to a devisee, and that the court would not oblige a mortgagee, who was likewise a creditor by bond, to sue the devisee under the statute of fraudulent devises. The Lord Chancellor (Hardwicke) agreed that this was the rule of the court as to a mortgagee, who was likewise a bond creditor against the heir, but he did not remember that it had ever been so determined in favor of such mortgagee, where there were intervening incumbrancers of a *superior nature* between his mortgage and the bond, and therefore would not direct that Mrs. Kynaston's bond should be tacked to her mortgage. And Lord Hardwicke further observed, in *Troughton v. Troughton*, ib. 659, that if a mortgagor after making a mortgage, borrow more money of the mortgagee upon bond, and the mortgage premises descend upon the heir at law of the mortgagor, or come to a volunteer, the court will not suffer them to redeem the mortgage without paying the bond, because it would occasion a circuitry by putting the obligee to sue for it out of the same estate, which was assets in the hands of the heir or volunteer; but where a person claimed the equity of redemption as a purchaser for valuable consideration, without notice of the mortgage [*sed query*, if notice be material in this case], the mortgagee could not tack his bond to his mortgage, because the estate was not liable to the bond debt. The bond creditor could therefore obtain satisfaction only out of the general assets of the father. In another case (*Heams v. Bance*, ibid. 630) Lord Hardwicke stated the reason why the heir should not redeem the mortgage without paying the bond likewise, to be, because the moment the estate descends on the heir, it becomes assets in his hands, and liable to the bond [and therefore, though strictly a bond, could not be tacked to a mortgage; yet since the bond creditor could by an action of *debet et detinet* recover the debt against the heir, he should, to prevent that circuitry of suit, be permitted to tack the bond to the mortgage]; and his Lordship said, a devisee too of the mortgaged premises, for his own benefit, was subject to the same rule, since the statute of fraudulent devises made in favor of bond creditors. But the case before him (*Heams v. Bance*) was the case of a devise in trust for the payment of debts; and the descent was consequently broken: so that, as his Lordship was then advised, he was of opinion the mortgagee could have no priority with regard to his bond, but as to that must come in *pro rata* with the rest of the creditors under the trust; but if the counsel for the mortgagee had an inclination to be heard on this point, it should stand over. The counsel thinking the point too strong against the mortgagee to be maintained, relinquished further investigation of the subject; and a decree was thereupon pronounced conformably to the Chancellor's opinion.

On the principle that tacking a bond to a mortgage was solely a matter of arrangement, and not of right, it followed that it could not be done to the

A bill was filed by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest: the defendant insisted to have a judgment, which

Judgment not tackable to mortgage of copyhold estate, lands not being bound thereby (H).

prejudice of creditors whose claims as to the bond debt were of equal degree. Accordingly, in an *Anonymous case*, in 2 Ves. 661, it was held, that although the bond was a charge on the assets, and the equity of redemption was part of the assets, yet the court never would allow it to be tacked to the mortgage against creditors. It was also said by the Chancellor in the same case, that a prior mortgagee could not tack a bond to his mortgage against the mortgagor, nor against his assignees of the equity of redemption. Where an executor of the mortgagee lent a further sum on bond, it was held by Sir Thomas Sewell, Master of the Rolls, on the authority of an unreported case of *Blackwell v. Syms*, before Sir J. Jekyll, that the executor might tack the bond to the mortgage as against the heir or devisee of the mortgagor, but not as against other creditors, if the estate be devised for payment of debts, and a charge for payment of debts was to be considered the same as a devise for that purpose. And where a woman who was a bond creditor married the mortgagee and died, and the husband took out letters of administration to his wife's effects, Sir Thomas Sewell held, that on a bill brought by the husband, he would be allowed to tack his wife's bond to his own mortgage against the heir at law of the mortgagor. *Price v. Fastnedge*, Amb. 685. The case of *Louthian v. Hassel* (ubi supra, test) is next in point of date. There Lord Thurlow acknowledged the rule in the clearest manner. The only reason, he observed, why the mortgagee could tack his bond to his mortgage was to prevent a circuitry of suits: it was solely matter of arrangement; for in natural justice the right had no foundation. The principle explained the rule; and therefore it should go no further. The circumstance of the creditor having another specific security could not in justice give him any priority. There being no foundation in justice, the only question was, whether the court was in the practice of doing it? and it had not in any case allowed the bond to be tacked to the mortgage but in that of the heir, and merely to prevent circuitry. So in *Hamerton v. Rogers*, 1 Ves. jun. 513, a bill of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors. Lord Commissioner Eyre saying it was a clear settled principle, that against creditors it could not be tacked. The same rule was acknowledged by Lord Alvanley, without variation, in *Jones v. Smith*, 2 Ves. jnn. 376; and though that case was reversed in *Domo Procerum*, it was on a point quite different from the one under consideration.

Synopsis continued.

Wife's bond tackable to husband's mortgage against heir of mortgagor.

The result of the whole class of cases on this subject is, that at the present day a mortgagee may tack a prior or subsequent bond debt to his mortgage (though no judgment may have been pronounced thereon), as against the heir at law of the mortgagor, a volunteer and a beneficial devisee; but not as against the mortgagor himself, his assignee or devisee for payment of debts, an assignee of the equity of redemption for valuable consideration, subsequent incumbrancers of a superior nature, or specialty creditors in the course of administration of legal assets. As to tacking, where the mortgage is with trusts for sale, see vol. iii. Index.

In what cases bond tackable to mortgage, and in what not.

(H) For more on the subject of tacking, see post, 434, Chap. XIII.

had been assigned to him, first satisfied, before he should redeem. Lord Harcourt, Chancellor, said, *Copyhold lands are not liable to an execution upon a judgment. Ergo* the judgment shall not be tacked to the mortgage in this case, but the plaintiff shall redeem upon payment of the principal, &c. without satisfying the judgment. *Cannon v. Pack*, ubi supra.

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Redemption of pledge, without redemption of mortgage, decreed.

Where one pledged personal securities for a specific debt (h), and, after a mortgage to the creditor, the same securities, with others, were pledged to him for the balance of an account. The transactions being distinct, redemption of the personal securities was decreed, without discharging what was due on the mortgage (i).

Heir of mortgagor cannot redeem without paying mortgagee's bond debt.

But if the mortgagor become indebted to the mortgagee also upon bond, and die (j), and his heir come to redeem, he shall not be admitted to redeem without paying the debt by bond; and the reason is, because the heir, after the redemption, will be in by descent, and, of consequence, the estate will be assets in his hands to pay bond debts; therefore, to avoid circuitry, the heir must pay both, before he will be permitted to redeem (k).

(h) *Jones v. Smith*, 2 Ves. jun. 372. v. *Wynch*, 1 P. Wms. 775. 1 Ves.

(i) *Shuttleworth v. Laycock*, 1 Vern. 87. *Heams v. Bance*, 3 Atk. 630. 245. S. C. 2 Ch. Ca. 164. *Coleman* 1 Ves. 87.

When lacking allowed to simple contract creditor.

(I) Sed vide what is said of this case, ante, §41, n. (Z) 4thly.

(K) In this case, the heir must be bound by the bond, that is, he must be specially named in the obligatory part of the bond, as indeed he usually is. And this rule, it seems, will extend to simple contract debts when the equity of redemption is assets in the hands of the heir or devisee. See ante, p. 319, n. (Y). In *Newley v. Cooper*, Finch. Rep. 379, a bill was filed by the mortgagee to foreclose the equity of redemption, if the principal and interest, and also a debt due on simple contract, were not paid within a certain time. Lord Nottingham decreed in favour of the bill as to the principal sum and interest, (the latter to be computed from the time of tender) and directed it to be paid at a time and place to be appointed by the Master, discounting the mesne profits, &c.; but left the mortgagee to his remedy at law, as to the payment of the debt due on simple contract.

That the mortgagee in foreclosing the heir, may tack a bond of the ancestor to his mortgage, see infra, vol. ii. p. 1019; but there is no direct authority for this position. The anonymous case in 2 Ch. Ca. 164, as also *Taylor v. Baversham*, ib. 194. *Windham v. Jennings*, 2 Ch. Rep. 247, and *Shuttleworth v. Laycock*, 1 Vern. 245, will, on consideration, be found beside the point.

Thus, where the defendant's grandfather (whose heir and executor he was), became bound with the plaintiff's father, (whose heir he was), in bonds for 4000*l.*, the plaintiff's father conveyed estates by way of mortgage to the defendant's grandfather to counter-secure him, and afterwards prevailed upon him to become bound with him for a farther sum of 2000*l.* The plaintiff's bill was to be admitted to redeem upon payment of what the defendant's grandfather had paid or been damnified by the bonds for 4000*l.*, and what remained due thereon; the question was, whether the plaintiff should be admitted to redeem without discharging both debts, there being no agreement proved that the mortgage was to be a security against the latter bonds? And it was decreed (*k*), that if the plaintiff would redeem, he should re-imburse and save harmless the defendant against the 2000*l.* as well as the 4000*l.*

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So, if the mortgage be of a lease for years, and afterwards more money be lent on bond, if the *executor* would redeem, he must pay both; for the equity of redemption is assets in his hands (*l*) (*L*).

Nor can executor.

(*k*) *St. John v. Holford*, 1 Cha. Ca. 97. *Anonymous*, 2 Vern. 177. Pre. Ch. 18. 512. *Gory's case*, 3 Salk. 240.

(*l*) [*Eccles v. Thawill*, called] *Ano-*

(*L*) So *vice versa*, if an executor of the mortgagee lends more money to the mortgagor on bond, he may tack the bond to the mortgage as against the heir or devisee of the mortgagor, but not as against creditors, if the estate be charged with the payment of debts. *Sheldon v. Cox*, Amb. 625. S. C. 2 Eden Rep. 224.

Tacking allowed to executors.

But if the executor of the mortgagor assign over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, he will be liable to pay the mortgage money *only*. *S. L. Vanderzee v. Willis*, 3 Bro. C. C. 21. So if J. S. mortgage a *leasehold* estate to B. who afterwards lends the mortgagor more money on *note*, the executor of the mortgagor bringing a bill to redeem, must pay both the mortgage money, and the debt by simple contract, because the equity of redemption will be assets in the hands of the executor to pay simple contract debts, *Anon.* 2 Vern. 177. *Demainbray v. Metcalf*, Pre. Ch. 419; but if any creditor of the testator had brought a bill to redeem this mortgage, he would have been required to pay the mortgage money only. *Coleman v. Winch*, 1 P. Wms. 776. This last sentence of *Coleman v. Winch*, must be considered as proceeding on the supposition that the executor has abandoned the equity of redemption, or that the simple contract creditor, praying a redemption, has previously procured an assignment of the equity,

Bond not tackable to mortgage against assignee of executor.

Simple contract creditor may redeem mortgage of leasehold estate, when.

This rule not to give pawnee preference to other creditors for his second debt.

So where jewels were pledged for a sum of money, and the pawnee afterwards lent divers other sums on the pawner's notes, and the pawner died, his executor was not admitted to redeem without paying the whole (*m*). But it was said, that if there had been any creditors of the pawner by bond, or a commission of bankruptcy out against him, the pawnee could not have tacked the notes to the pawn, so as to have preferred himself before the other creditors (*m*).

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Husband administrator may tack his wife's bond to his own mortgage against heir.

And where a woman, being a bond creditor, married a mortgagee and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage against the *heir at law* (*n*).

No tacking against assignee of mortgagor's executor.

But if one be indebted to A. by mortgage of a *term for years*, and also indebted to him by bond; if on the death of the mortgagor *the executor* assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, *he* shall only pay the mortgage money (*o*) (*N*).

(*m*) *Demary v. Metcalf*, Gilb. Rep. Eq. 104. Pre. Ch. 419. Eq. Ab. 324.

(*n*) *Blackwell v. Symes*, cited Amb. Rep. 686.

(*o*) 2 P. Wms. 76. Et vide supra, 351, 2.

otherwise in general cases a simple contract creditor will not be permitted to redeem. In the case of *Franklyn v. Fern*, ante, 382, where the minor part of creditors of a bankrupt were allowed to redeem, the equity of redemption was in the assignee of the bankrupt for their benefit; and therefore, in some sense assigned to them, at least to their use and benefit; but the rule as to this is adduced in the note to the page lastly referred to.

Observations on Demary v. Metcalf.

(*M*) This case is also reported in 2 Vern. 698 and 690, under the title of *Demainbray v. Metcalf*, in which latter place a *quære tamen* is added. See 2 Vern. 691. The case is somewhat differently stated; but the same point is determined. How far the court would decide that a subject, which is pledged as a security for a particular debt, shall be considered as a security for further loans, must, from the nature of the thing, and in fact does, depend on the circumstances of each particular case. The cases that contain the material disquisition on this subject, are *Green v. Farmer*, 4 Burr. 2214. S. C. 1 Bl. Rep. 651. *Jones v. Smith*, 2 Ves. jun. 372.

(*N*) And the same rule will hold with respect to the grantee of the heir at law, as the bond is not a lien on the land.

But one taking a mortgage from an heir of an estate charged with debts, cannot tack an old debt of his own outstanding, so as thereby to oust the creditors (*p*). Nor where heir mortgages estate charged with debts to a creditor.

Since the statute against fraudulent devises, the devisee of the equity of redemption cannot redeem without payment of the debt upon bond, and upon mortgage (*q*); because the statute makes such devise void against creditors, and then the devisee stands in the same place as the heir would have stood if no devise had been made; but, before that statute, such devisee would not have been liable to a bond creditor. Bond tackable to mortgage against devisee of equity of redemption.

But where the question was, whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a trust for payment of debts, created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage (*r*); for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in, *pro rata*, with the rest of the creditors under the trust (*o*). But devises in trust for payment of debts not liable to pay bond debt.

(*p*) *Ithell v. Beane*, 1 Ves. 215. 1 Atk. Abr. 325. 9. [S. C. 15 Vin. Abr. 466. 463. Et supra, 222, 3. —Ed.]

(*q*) Pre. Ch. 511. 3 & 4 W. & M. (*r*) *Heums v. Bance*, 3 Atk. 630. c. 13. *Challis v. Casborn*, 1 Eq. Ca.

(O) These decisions have been fully confirmed by the late Master of the Rolls, in the case of *Adams v. Claxton*, 6 Ves. 229, where a testator, having a policy of insurance upon his life for 1386*l.*, assigned the same to the defendant for securing 1000*l.* and interest, and afterwards borrowed 300*l.* more, on a note of hand, and then assigned his effects to trustees for the benefit of creditors, and died; whereupon the defendant, holding the policy, applied to the insurance office, and received the money due on the assurance, and then claimed to retain beyond the 1000*l.* so much of the money as would pay him the subsequent debt on the note of hand. Sir William Grant however would not allow the claim, because the equity of redemption arising on the mortgage of the policy passed by the assignment to the trustees for the benefit of the testator's creditors, upon the principle laid down by Lord Thurlow in the case of *Vanderzee v. Willis*, cited ante, p. 352, n. (L), that where the equity has passed to an assignee, you cannot insist on retaining it against the assignee. And his Honor said it was clearly settled, that in the case of a mortgage, the right to attach a subsequent debt to the mortgage could not be made available against an assignee of the equity of redemption. Case confirming doctrine in text.

Not part of purchase-money on note, where part was secured to a vendor by mortgage, and part by note.

And where A. purchased of B. the lands in question, and mortgaged them to him for securing part of the purchase-money, and for other part thereof gave a note payable on demand, on which 200*l.* remained unsatisfied, and A. devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets (*s*); the question was, whether this 200*l.* remaining due on the note, being for part of the consideration money, should have a preference to other debts, and be looked on in equity as a charge upon the land, and the rather, for that B. as mortgagee, had the real estate in him? And it was held, that B. could have no preference, but must accept satisfaction in proportion only with the other creditors (*P*).

No difference whether bond debt be before or after mortgage.

If the money due on the bond be lent first, and the mortgage made afterwards, yet there is the same equity as against the heir of the mortgagor for the mortgagee to have both

(*s*) *Bond v. Kent*, 2 Vern. 281.

Equitable lien for purchase-money unpaid, not removed by taking security for same.

(*P*) Where a vendor conveys his estate to the vendee without receiving all or part of the consideration money he has as against the vendee and his heir (*Hughes v. Kearney*, 1 Sch. & Lef. 135), and all persons claiming as volunteers or purchasers for valuable consideration with notice (*Hennard v. Moore*, 1 Eden, 327), a lien on the estate for the whole or such part of the purchase-money as remains due, *Chapman v. Tanner*, 1 Vern. 267. Amb. 726. *Walker v. Preswick*, 2 Ves. 622; and this, though the consideration money be on the face of the instrument expressed to be paid, and a receipt for the same be indorsed on the deed. *Saunders v. Leslie*, 2 Ball & Bea. 514. *Grant v. Mills*, 2 Ves. & Bea. 306. *Peake Ex parte*, 1 Madd. Rep. 346. This is an equitable lien arising from an implied contract, which courts of equity suppose to exist between the vendor and vendee. *Blackburn v. Gregson*, 1 Bro. C. C. 420. *Mackreth v. Symmons*, 15 Ves. 349. *Cowell v. Simpson*, 16 Ves. 279. *Smith v. Hibbard*, 2 Dick. 730. *Harrison v. Southcote*, 2 Ves. 389. But in cases of this sort the presumption of an implied contract between the parties may be rebutted by clear evidence, that they did not intend to reserve such an equity. And it has generally been considered, that a waiver of this equitable lien was intended where a special pledge or security has been given for the money unpaid. Thus (as in the text) the taking a promissory note for the residue of the purchase-money, has been held to afford evidence of an intention to give up the equitable lien. But it is now settled that the taking a promissory note (*Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682), or indeed any other security for the purchase-money unpaid, will not of itself be sufficient to remove the equitable lien, as we shall have occasion to notice more in detail in the latter part of this work. See p. 1062, *infra*.

sums paid him (*t*). Thus, where A. borrowed of B. 300*l.* on bond, and afterwards mortgaged lands to B. for 2000*l.* lent, and then *died*, the plaintiff, the heir of A. prayed a redemption; and the defendant insisted that the 300*l.* was agreed to be secured also by the mortgage: and the plaintiff was decreed to pay the defendant both debts.

This appears to be one of those instances in which equity will carry the debt beyond the penalty of the bond, if the principal and interest exceed it (*u*); for, in this case, the obligee is the defendant, and the plaintiff applies for redemption: therefore if the principal and interest exceed the penalty, the plaintiff, in equity, ought to pay it, for he comes for equity; and it is a maxim that *he that seeks equity must do it* (*q*).

Bond tacked to mortgage must be paid in full, though it exceed penalty.

(*t*) *Wyndham v. Jennings*, 2 Ch. Rep. 247. *Hallib v. Kirtland*, 2 Ch. Rep. 361. *quare*, as the law is now understood, viz. that the tacking is in equity merely to avoid circuity of action, vide supra.

(*u*) *Peers v. Baldwin*, 2 Eq. Ca. Abr. 611, pl. 4. 3 Atk. 518. *Sed* [348.—Ed.]

(*Q*) Whether the excess of principal and interest beyond the penalty of the bond could in any case be recovered, was, till a recent period, a disputed point. It is however now finally settled, that interest on a bond cannot be computed beyond the penalty, ante, p. 15, n. (L). There are some few exceptions to this rule, which will be better developed by a chronological view of the cases. After a perusal of which we shall be better prepared to decide on the authority of the case cited in the text, and to appreciate the value of the learned author's doubt.

As to carrying interest beyond penalty of bond.

One of the earliest cases on this subject is that of *Jevon v. Brush*, 1 Vern. 348, where principal money with damages was decreed to be paid, but not beyond the penalty of the recognizance. Then came *Hale v. Thomas*, ibid. 349, where it was insisted that equity ought not to charge the defendant beyond the penalty of a judgment, and the court allowed the objection. It was however said, that equity did in some cases carry on the debt beyond the penalty in favor of the defendant, on the maxim, that he who came for equity must do it, as where the party had been delayed by injunction of the court or the like; but never in favor of a plaintiff any further than he could charge the defendant at law, because the plaintiff had chosen his own security, and therefore must abide by it. The next case is also to be found in 2 Vern. 509, (*Steward v. Rumball*) where the Lord Keeper Cowper was of opinion, that, including what had been paid, though at several payments and then many years since, the defendant should have in the whole no more than the penalty of the bond, observing, that a man could have no more than his debt; and the penalty was the utmost of the debt. So, shortly afterwards in an *Anony-*

Cases on that head.

*Bond in nature
of further*

But if there be a subsequent loan of money on bond by a mortgagee, with a declaration that it shall be a surcharge, if

*Lord Cowper's
expression of
rule.*

mous case, 1 Salk. 154, which was heard at the Chancellor's house, Lord Cowper, who was then Chancellor, held, that *if there were a bond debt, and the interest had outrun the penalty, it should not carry interest beyond the penalty; but if the party had neglected to pay interest after a reasonable time, he should, after such neglect, pay interest beyond the penalty.*—Then follow the three cases in Viner's Abridgment, 1st. *Galway v. Russell*, 14 Vin. Abr. 460, where it was held, that equity would never carry interest beyond the penalty, where there had been no demand for many years. 2d. But where advantage had been made of the money, interest, it was said, might be carried beyond the penalty. *Lord Dunsany v. Plunket*, *ibid.* So 3d. Where a bond was only a collateral security, it was held, that interest might be carried beyond the penalty. *Kerwin v. Blake*, *ibid.* These cases were decided during the time of Lord Macclesfield; and the two first of them were, on appeal to the House of Lords, affirmed. 2 Bro. P. C. 251. 275.—Lord Hardwicke, in referring the computation of accounts in bankruptcy to a Master, ordered him to allow interest on bonds; but *not beyond the penalties.* *Bromley v. Goodere*, 1 Atk. 80. During the latter part of his presidency, Lord Hardwicke adopted the maxim of Lord Cowper, that a person who comes for equity must do equity. On this principle he decided in *Godfrey v. Watson*, 3 Atk. 517, that a debtor coming into a court of equity for relief, would be directed to pay interest to the creditor, even though it should exceed the *principal*: and that if a mortgagee had tacked a judgment to his mortgage, he would not be confined to the penalty of the judgment, but would be entitled to interest on the debt, secured by the judgment, down to the time the principal was paid off, although it might exceed the penalty.

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*Reference to
cases at law
where interest
was allowed be-
yond penalty.*

In a case in the Exchequer, some years before that of *Godfrey v. Watson*, interest on a bond was decreed to be paid, though it exceeded the penalty. *Elliott v. Davis*, Bunb. 23; and this case was much relied on by Mr. Justice Buller, in *Lonsdale v. Church*, cited *supra*. Sir Thomas Clarke, on the contrary, in *Grosvenor v. Cook*, 1 Dick. 308, held, that at law creditors by bond were entitled only to the penalty of the bond, and the reason, he observed, was obvious, for that they had chosen their own security, and it was their fault in suffering the debt to increase beyond their security. Lord Camden was so strongly of the same opinion in *Gibson v. Egerton*, *ibid.* 408, that he wished he had been warranted in making the exceptants pay costs. At law the point was determined as Sir Thomas Clarke had held in *Grosvenor v. Cook*, *ubi supra*. Thus in *White v. Sealy*, 1 Doug. 49, where there was a bond for payment of rent, Lord Macclesfield decided, that the bond was a security to the *amount of the penalty only*. And Mr. Justice Buller concurred in the decision. So in *Brangwin v. Perrat*, 2 W. Bl. 1190, the case of a bond to indemnify a parish, the court made a like order, that upon payment of the penalty and costs into court, the defendant should be relieved from the bond. Shortly afterwards however Mr. Justice Buller expressed himself dissatisfied with the determination in *White v. Sealy*, *ubi supra*; and in *Lonsdale v. Church*, 2 T. R. 389, said, he was persuaded many cases had been determined on the

seems the mortgagee would be entitled to both on redemption (x). charge tackable to mortgage on redemption.

(x) *Goddard v. Complin*, 1 Ch. Ca. 119. *Bedford v. Backhouse*, 2 Eq. Ca. Abr. 615, pl. 12.

point, though they did not occur to the court then; and, on searching, he had found several cases where the doctrine had been before established, on the authority of which (though not much in point) the court held, that in debt on bond, with condition to account for money to be received, proceedings should not be stayed upon paying the penalty into court, because damages might be recovered beyond that amount. And the constant practice of giving one shilling damages in actions on a bond was considered as a strong circumstance in favor of the adjudication, since that practice was in fact an acknowledgment that money beyond the penalty might be recovered. In *Knight v. Maclean*, 3 Bro. C. C. 496, Mr. Justice Buller, who was sitting for the Chancellor, adhered to his former opinion, stating the question to be, whether the Master ought not to calculate the whole interest due, without stopping at the penalty? And he observed, "that cases might be found which say the interest shall only be to the amount of the penalty; but they were very old cases, and were determined in conformity to the rule of law. But it was held otherwise even there. He remembered a case in the year 1765, in the King's Bench, where it was held otherwise; and Lord Mansfield cited a case at Nisi Prius, where Mr. Justice Wright directed the jury to find damages beyond the penalty. The case of *Wright v. Sealy*, Doug. 48, was determined on the ground of its being the case of a surety, who never could be held to have intended to bind himself beyond the extent of the penalty; but the exception proved the general rule to be otherwise. Then if it were so at law, where was the equity to prevent it being so here (in Chancery). Would a court of equity narrow the remedy of creditors, whom in general it favored more than a court of law did?"

But Lord Thurlow, on a rehearing, 1 Bro. C. C. 496, disapproved of the doctrine advanced by Mr. Justice Buller, observing, that if it were a universal rule at law to carry interest beyond the penalty, it must be so against the heir and executor and simple contract creditor: and yet the penalty was the debt at law, and always so considered. If so, how could any thing beyond charge the heir or executor? Could damages on the *detinet* be recovered beyond his own time? One shilling damages entered on verdict for the penalty were *pro forma* only, because there being an injury, damages were in notion of law sustained; so in judgment by default, &c. If interest were calculated, and judgment taken against an executor, beyond the penalty, should the excess be paid as a specialty, and exclude other specialty creditors? The law certainly was considered as clear by Lord Mansfield and by Lord Hardwicke, that you could not go beyond the penalty; and the decisions of equity had been uniformly on the same principle: the cases cited were exceptions allowed. And his Lordship doubted whether he could determine the point on these exceptions; and said he should choose to have the matter settled at law before he decided. Soon afterwards the case of *Tew v. Winterton*, 3 Bro. C. C. 489, where the same point was agitated and decided) came on; and Lord Thurlow

These cases now over-ruled.

having, in the mean time, satisfied himself on the subject, decreed that the Master, in computing interest on the bond, should *not* go beyond the penalty. Conformably to this opinion, courts of law have regulated their decisions in subsequent cases; and we may now consider the doctrine of Mr. J. Buller as exploded. Lord Kenyon, in *Wilde v. Clarkson*, 6 T. R. 304, said, he could not accede to the doctrine laid down in *Lonsdale v. Church*; for, according to that, an obligor who became bound in a penalty of 1000*l.* conditioned to indemnify the obligee, might be called upon to pay 10,000*l.*, or any larger sum however enormous, adding, that in actions on bonds, or any penal sums for performance of covenants, &c. the act of parliament (vide 8 & 9 W. 3. c. 11. s. 8.) expressly said, that there should be a judgment *for the penalty*, and that the judgment should stand as a security for further breaches; but the obligor was not answerable in the whole beyond the amount of the penalty.

Bond creditor neglecting to tack bond to mortgage, cannot recover more than penalty.

Revival of debts by devise for their payment.

No interest beyond penalty. Secus after judgment recovered on bond.

The case most resembling the one in the text, is that of *Lloyd v. Hatchett*, 2 Anstr. 525, to the consideration of which we next proceed:—The mortgagee who had been in possession for thirty-three years, brought his bill to foreclose. The plaintiff and other creditors of the mortgagor having obtained from him a conveyance of the equity of redemption, for the use of the creditors at large, filed a bill to redeem. At the hearing, it was, among other things, referred to the Deputy Remembrancer, to take an account of what was due to the mortgagee on a bond, which the mortgagor had given him nearly about the same time as the mortgage. The Deputy Remembrancer reported the whole principal and interest for thirty-three years to be due thereon. An exception was taken to this report, that the sum due exceeded the penalty of the bond: and at a further hearing it was objected, that the mortgagee could not tack the bond to his mortgage as against the mortgagor and purchaser. But it was held, that the court having referred it to the Deputy Remembrancer to take an account of what was due on the bond, it was too late to object that the bond had no preference. The case stood over till a future day, when the Barons gave their opinion that the mortgagee could claim nothing beyond the penalty of the bond. Baron Thompson referring to a case of *Kettleby v. Kettleby*, before Lord Bathurst, in which he was counsel, and wherein it was held, that simple contract debts, even for seventy years standing, were renewed by a devise for payment of debts, and were paid with full interest; but the bond debts were only allowed interest to the amount of the penalty, and were therefore in a worse situation than those upon simple contract. As to the revival of debts by a devise for their payment, see *Deudney Ex parte*, 15 Ves. 497; and for rule as to recovery beyond penalty of bond, where the bond creditor has also a mortgage, *infra*, *Clarke v. Abingdon*, next page.

Where a bond and judgment were assigned, interest was directed to be calculated to the date of the report, but not so as to exceed the penalty, *Sharpe v. Scarboro'*, 3 Ves. 557. So in *Mackworth v. Thomas*, 5 Ves. 329, arrears of an annuity secured by bond were allowed; but not beyond the penalty. In *M'Clure v. Dunkin*, 1 East Rep. 456, where judgment on a bond had been recovered in Ireland, it was objected, that interest could not be recovered beyond the penalty of the bond, which was set forth in the declaration. Lord Kenyon said, that if this had been an action on the bond, the objection would have been good; but after judgment recovered *transit in rem judicatum*, the nature of the demand was altered; and this being an action on

But, if the mortgagee or assignee, to whom money is due on bond, countenance a fraud upon a third person, by con-

Mortgagee denies interest to be in arrear;

the judgment, it was competent to the jury to allow interest to the amount of what was due; and in this respect he saw no difference between a foreign judgment and a judgment in a court of record in England.

The subject under consideration was again thoroughly mooted in *Clarke v. Seton*, 6 Ves. 411, where it may be considered as finally settled, that interest beyond the penalty of the bond will not be allowed except under special circumstances. The special circumstances alluded to by Sir W. Grant, Master of the Rolls, in this case, were such as the obligee could not control, and which necessarily deferred him to a distant period, during which time the accumulations of interest would exceed the penalty, as in the case of *Bodily v. Bellamy*, 2 Burr. 1094, where the obligee was greatly delayed by writs of error, &c. But it was not in course, Sir W. Grant said, to allow interest beyond the penalty; for the penalty was the debt both at law and in equity. In a later case, however, the same learned Judge allowed interest to be calculated beyond the penalty of the bond, where there was a mortgage given for securing the same sum. *Clarke v. Abingdon*, 17 Ves. 106. His Honor there remarked, that the creditor had two securities, one by bond the other by mortgage. If the creditor sued on the former, he could not have interest beyond the penalty; but the mortgage was to secure the payment, not of the money due on the bond; but of the sum for which the bond was given, together with all interest that might grow due thereon: the same sum was therefore differently secured by different instruments, by a penalty, and by a specific lien. The creditor might resort to either; and if he resorted to the mortgage, the penalty was out of the question. If the creditor by mortgage afterwards took a bond, it was admitted that he might recover on the mortgage, interest beyond the penalty of the bond. And there was no reason why the effect should be different, if to day a mortgage were made to secure a sum, for which a bond was given the day before. His Honor therefore thought the exception ought to be allowed. The exception was, that the Master ought to have computed interest beyond the penalty, in calculating the amount of principal and interest due on the bonds. Vide etiam *Seton v. Slade*, 7 Ves. 274, where the Lord Chancellor said, a court of equity had relieved against the penalty long before a court of law.

Interest beyond penalty allowed on special circumstances.

Mortgagee may transfer excess of debt beyond penalty of bond to his mortgage.

In *Rushworth Ex parte*, 10 Ves. 409. *Hefford v. Alger*, 1 Taunt. 220, and *Shutt v. Procter*, 2 Marsh. 226, the subject was again brought before the Judges, and they decided in unison with the three last adjudications. As to the special circumstances which are said to vary the case, it has been before remarked, that accumulations of interest beyond the penalty will be allowed if they are occasioned by delays arising from the conduct of the obligor, or under circumstances which the obligee cannot controul. If, therefore, by an injunction of the Court of Chancery, the obligee is prevented from recovering his debt till the arrival of a certain period, during which time the interest increases the principal of the bond beyond the penalty, he will be allowed the whole sum due, against the general rule. The case of *Atkinson v. Atkinson*, 1 Ball & Bea. 239, is the latest case on this subject, and the last we shall have

What circumstances will carry interest beyond penalty.

SECRET

[illegible]

redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect, such as by imprisonment, infancy, coverture, or by having been beyond sea, and not by having absconded, which is an avoiding or retarding of justice. And, to preserve an uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, hath been fixed upon as the period, beyond which a right of redemption shall not be favoured (T).

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Twenty years possession by mortgagee, without payment of interest, and no disability in mortgagor,

prima facie a bar to equity of redemption.

(T) It has been said, that this rule is not founded on the presumption of an absolute conveyance, but is merely a positive rule, introduced for the sake of quieting the title after so long a neglect to redeem. Per Eyre, C. B. in *Corbett v. Barker*, 1 Anstr. 143. The maxim is *equitas sequitur legem*. It was first hinted at in *Winchcombe v. Hall*, and *Porter v. Emery*, 1637. 1 Ch. Rep. 40. 97, then in *Saunders v. Hord*, and *Clapham v. Bowyer*, ib. 184. 206, and afterwards adopted as a rule of court by Lord Keeper Bridgman and the Master of the Rolls in *Pearson v. Pulley*, 1 Ch. Ca. 102, and followed by Lord King, in *White v. Ewer*, 2 Vent. 340. But the rule seems not to have been permanently settled till about the middle of the last century. So late as the year 1722, an appeal came on in the House of Lords, wherein the doctrine was but imperfectly acknowledged. It was there held, that a mortgagee in possession for seventy years under a legal title, should not be redeemed or disturbed; for so long an acquiescence should be taken as an implied waiver of the right to redeem, especially where the rents were insufficient to keep down the interest for more than fifty years. *Stone v. Byrne*, 2 Bro. P. C. 399.

Origin and progress of rule.

We may now, however, consider the rule as permanently established, and the principles on which it is founded as perfectly understood, and clearly developed. Courts of equity, by their own rules, independently of any statute of limitations, give great effect to length of time. They refer frequently enough to the statute of limitations, but it is for no other purpose than as furnishing a convenient measure for the limitation of the time which ought to operate as a bar in equity to any particular demand. *Beckford v. Wade*, 17 Ves. 87, Lord Redesdale, referring to the rules in equity on this subject, observed, in a recent case, *Hicks v. Cooke*, 4 Dow P. C. 27), that the change which in a long course of time takes place in the value and circumstances of property, and the consequent difficulty or impossibility of doing that justice between the parties, which might be done when transactions are recently challenged, were reasons why length of time was a bar to relief in cases where the transaction, if recently impeached, would have been set aside. In like manner Lord Manners is reported to have said, in *Medlicot v. O'Donnell*, 1 Ball & Bea. 156, "It has been suggested, that I lay too much stress upon length of time, and that I attach more credit to it than Lord Redesdale, or any of my predecessors have done; I confess I think the statute of Limitations is founded upon the soundest principles, and the wisest policy, and that this court, for the peace

Its foundation in equity.

As to plea of statute.

And a defendant, in a bill for redemption, may avail himself of this equity by pleading the statute of limitations. This

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of families, and to quiet titles, is bound to adopt it in cases where the equitable and legal title so far correspond, that the only difference between them is, that the one must be enforced in this court, and the other in a court of law." The principles that govern courts of equity in applying length of time as a bar to relief, were still further remarked upon by Sir Thomas Plumer, Master of the Rolls, in the late case of *Chalmer v. Bradley*, 1 Jac. & Walk. 63. They did not, Sir Thomas Plumer observed, proceed on the ground of individual hardship or loss: public policy required that persons should not lie by and call for accounts at a distant period, when the accounting party was dead, and under all the difficulties that arose when the vouchers were lost, and the memory of witnesses gone. *It was not, as a bar by analogy to the statute, that the length of time operated in equity, but it gave a ground for presuming in favour of the length of possession.* It was on this principle that, in courts of law, acts of parliament, grants, and releases, had frequently been presumed.—It is, however, observable, that Lord Redesdale, in *Bond v. Hopkins*, 1 Sch. & Lef. 427, as also in *Hovenden v. Annesley*, 2 ib. 632, thought that the statute must be taken virtually to include courts of equity; and the language of Lord Manners as above stated, is indicative of a similar opinion. In the old case of *Saunders v. Horde*, ubi supra, the court also seems to have considered that the plaintiff was barred in equity, not by analogy to the statute, but by the statute itself. For all purposes of relief it is sufficient to say, that the statute bars in equity by analogy, and not by its direct operation.

The analogy however is not preserved throughout. With respect to disabilities it is, but with reference to length of possession it is not, and the reason is obvious; for courts of equity have no remedy by writ of right or other suit in the nature of a real action; (but equity would not perhaps enjoin a party from proceeding at law, merely because he has lost his equitable title by twenty years negligence). In conformity it has been held, that twenty years adverse possession of an equity of redemption is a complete bar to another person claiming the same equity of redemption, although at law the possessory remedy merely would have been lost in that period; *infra*, 368 b. 385; et vide *Cholmondeley v. Clinton*, *infra*, vol. ii. 1155. So it has been held, that twenty years adverse possession by a mortgagee will bar a remainder-man (both at law and in equity), although his title may not have fallen into possession until after the twenty years elapsed, *infra*, 368. Hence adverse enjoyment will, in equity, constitute a good title in a much shorter period than at law.

Of the rule by the Roman law.

By the civil law, in case the mortgage money was not paid at the stipulated time, the creditor was empowered to sell the pledge, allowing the debtor two years, after notice given, to redeem it in. Inst. ii. tit. 8. s. 1. Halifax Anal. Civil Law, p. 64. If, however, the creditor, instead of selling the estate, had continued the possession of it himself, he and his heirs would have remained perpetually obliged to restore the pledge after payment of the debt, and could never pretend to have acquired any property therein by prescription. Codex, lib. 10. de pign. act, l. ult. eod. On the other hand, the

point was so settled by Lord Hardwicke, after an investigation of the authorities on the subject, in the case of *Aggas v. Pickerell* (c), and the plea allowed (u).

(c) 3 Atk. 225. [Et vide *Chapman v. Boyer*, infra, 365.—Ed.]

hypothecary action could only be extinguished by a prescription of forty years against the mortgagor and his heirs, and likewise against a third possessor, if the debtor were still alive. 1 Domat, C. L. 382, s. ix. n. (1).—The term of forty years is evidently too long a period to keep open a claim of this sort. If the mortgagee and his heirs sleep on their rights for twenty years, they certainly deserve to lose them at the end of that period. Twenty years acquiescence in the mortgagor's title, is surely good evidence of their abandonment of all charge on the estate. This rule of the civil law might possibly have given rise to the supposition that forty years were necessary by the law of England to bar the mortgagor, and it might have been thought, that since the mortgagee, though in possession, was but a trustee for the mortgagor, no adverse possession arose against him (the *cestui que trust*) till the effluxion of twenty years, and then that it required a further term of twenty years of such adverse possession (making together forty years) before the mortgagor could have been barred; but no such rule ever prevailed in England, though passages to that effect are to be found in some of the text writers on this subject.

(U) In like manner where the heir of a mortgagor brought a bill to redeem an old mortgage, and the defendant pleaded title as a purchaser for valuable consideration without notice, under a marriage settlement made by the original mortgagee, and a quiet possession thereunder for seventy years, the plea was allowed. *Randall v. Shaw*, 4 Bro. P. C. 74.

Statute may be pleaded in equity.

Whether length of time could be taken advantage of by demurrer, was made a *quare* by Mr. Cox, in his edition of P. Wms. vol. iii. p. 287, n. (1), who there cites *Edsell v. Buchanan*, 4 Bro. C. C. 254, and states that the Lord Chancellor, in that case, expressed much doubt on the question.—In *Gregor v. Molesworth*, 1 Ves. 209, Lord Hardwicke said, *it was not proper matter for demurrer, but ought to be pleaded*. See similar decisions in *Saunders v. Horde*, 1 Ch. Rep. 184. *Frazer v. Moore*, Bunb. 54. *Jenner v. Tracey*, 3 P. Wms. 287, n. (B). This doctrine of Lord Hardwicke has of late been very much weakened by modern cases; and Mr. Belt considers it to be quite clear now, that the statute of limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by way of demurrer, notwithstanding the decision of Lord Hardwicke in *Gregor v. Molesworth*. See 3 Bro. C. C. 632, n. (1). The late determinations do not expressly over-rule the lastly-mentioned case, but there can be little doubt of the genuineness of the rule as stated by Mr. Belt. Indeed it is said, 2 Sch. & Lef. 638, that Lord Kenyon held, at the Cockpit, in *Beckford v. Close*, that a demurrer to a bill, on the ground that it did not shew a good title to redemption within twenty years, was a good demurrer; because, added Lord Redesdale, it was the rule of the court that no redemption should be allowed after twenty years, and therefore the party should be put to bring his case by his bill within that rule. And Lord Redesdale further observed, that Lord Thurlow's opinion, in *Deloraine v. Brown*, 3 Bro. C. C. 633, was given in a hurry, and many causes were then

Mortgagee may take advantage of length of time by plea or demurrer.

Ten years allowed for prosecuting claim after disabilities removed.

And as the courts do, *prima facie*, consider the redemption as barred after twenty years, where there is no disability

pending, in which much injury might have arisen to the parties, if the judgment had not then been pronounced; but Lord Kenyon's opinion was perfectly tenable, on Lord Thurlow's own qualification, namely, that when a party does not by his bill bring himself within the rule of the court, the other party might, by demurrer, demand judgment whether he ought to be compelled to answer. In *Hardy v. Reeves*, the Master of the Rolls said, he had no doubt a demurrer to a bill for redemption, on the ground of length of time, would be good, if the bill was so framed as to state such a case. The Vice Chancellor, however, thought it would be difficult to suppose such a case, where the bill would not allege something to take it out of the analogy to the statute. *Hodle v. Healey*, 1 Ves. & Bea. 536. In that case, the defendant put in a general demurrer to the bill for want of equity, on the ground that he had been in possession of the property upwards of twenty years without account. Sir Thomas Plumer, V. C. said, there was no doubt that advantage might be taken of this objection by demurrer, if the bill so stated the case; that there was nothing to interfere with the lapse of time, to the benefit of which the defendant was entitled; but, as before observed, his Honor thought it difficult to suppose such a case, and over-ruled the demurrer, on the ground that the rule on which it was founded did not apply, for that the defendant had, within the last twenty years, clearly acknowledged himself to be in possession, not as owner, but as mortgagee. The analogy of the statute, therefore, was destroyed, and the facts supporting the demurrer were untrue. In the lastly mentioned case of *Hodle v. Healey*, the counsel for the plaintiff admitted that a demurrer was as available as a plea, to take advantage of length of possession, but a plea, they said, was evidently a more proper course, and as issue could be taken by the plaintiff on the facts set up, it ought to be encouraged. In the latest reported case on this subject (*Foster v. Hodgson*, 19 Ves. 184), Lord Eldon thought the establishment of the rule, as stated at the Cockpit, would not be attended with mischief. It was true, that previously to the case of *Beckford v. Close*, the universal opinion was, that advantage could be taken of the statute by plea only; but the reason given by Lord Hardwicke (3 Atk. 226), that the plaintiff might amend his bill, would destroy all demurrers. Lord Eldon further observed, that he was counsel in the cause of *Beckford v. Close*, and was sure that Lord Kenyon, upon the doctrine he then held, thought that advantage might be taken of a case of this sort by demurrer. We may therefore now take the rule of court to be so settled, and dismiss the subject with that understanding, merely referring to a few other cases, where a discussion of the point may be found, if further investigation be deemed essential. See *Dewdney Ex parte*, 15 Ves. 479. *Waugh v. Land*, Coop. 132. *Metcalf v. Brown*, 5 Price, 560. *Lloyd v. Lander*, 5 Madd. 282; and among the old cases, *Sibson v. Fletcher*, 1 Ch. Rep. 59. *Nance v. Coke*, 2 ib. 131. *Dean v. Garell*, Finch, 111. *Hellam v. Grace*, ib. 205. *Pearson v. Pulley*, 1 Ch. Ca. 102. *Lockwood v. Ewer*, 3 Atk. 225. *Trash v. White*, 3 Bro. C. C. 289; preserved by *continuando*, *Gregory v. Hurrill*, 3 Brod. & Bing. 212.

Plea said to be the preferable mode.

Length of time not a complete

The student should, however, be apprised, that length of time cannot be set up by demurrer, as a complete bar to an equitable demand, for length of

in the mortgagor, in imitation of the first clause of the statute of limitations (d); so, after the disability is removed, the time fixed for prosecuting in the proviso, which is ten years, ought likewise, it seems, to be observed (x). Thus, at a rehearing before the Lord Keeper (e), assisted by two justices, concerning the redemption of a mortgage that had been made above forty years, the court declared the mortgagors should not be relieved after twenty years, for, though these matters

(d) *Per* Lord Talbot, in *Belch v. Hervey*, 3 P. Wms. 288, note. *Quære* et vide *infra*, 392, *Rakestraw v. Brewer*. (e) *White v. Ewer*, 2 Vent. 340. 1 Cha. Ca. 102.

time operates as a bar, not *proprio jure*, but as a fact shewing acquiescence; and a party cannot avail himself of an inference from facts on a demurrer. *Deloraine v. Brown*, 3 Bro. C. C. 633; but length of time may be urged with great effect at the hearing of the cause, for it is a rule founded on the principles of public policy. See *Hercy v. Dimwoody*, 4 Bro. C. C. 268. The very forbearance to make a demand will be considered as affording a presumption, either that the claimant is conscious it was satisfied, or intended to relinquish it. *Pickering v. Lord Stamford*, 2 Ves. jun. 280. 582, 3. bar on demurrer. Secus at hearing.

(X) The learned author adds a *quære* in his note (d); but the reason of his doubt is not apparent. In the late case of *Beckford v. Wade*, 17 Ves. 97, it was held, that an equity of redemption was barred by twenty years possession under the mortgagee, provided the mortgagor were under no legal disability; and if he were, then by ten years acquiescence after the impediment had been removed. Text confirmed by late case.

Barnardiston narrates a case where A. and B. his wife, by deed and fine, mortgaged her estate to C.; they then sold their equity of redemption to D. for 10*l.* and covenanted, that the fine should be for strengthening the latter deed. C. entered and made many improvements. Twenty-three years afterwards A. died, and nine years after, his wife B. died. Then E. her heir, sold all his interest to F. for 81*l.* who brought his bill to redeem ten years after the death of B.; but the court would not allow it, more especially as the payment of the purchase-money by F. to E. was not clearly proved. *Fleetwood v. Templeman*, Barnard. 187. F., in this case, is what Lord Hardwicke calls a prowling assignee, and on whom the court looks with a jealous eye, turning (by fair means) every circumstance where there is doubt to his disadvantage, for the purpose of discouraging traffic in latent equities; but if he has paid a *bonâ fide* consideration for the equity, though it be an inconsiderable sum, and no fraud in the case, he will be allowed to redeem if the twenty years have not elapsed, and must have all the benefit of the rule. *Anon.* 3 Atk. 314. Vide etiam as to the analogy of equitable rules on this section of the statute, *Lyton v. Lyton*, 4 Bro. C. C. 441, and *Pim v. Goodwin*, and *Blake's case*, stated by Mr. Sugden in his argument in *Cholmondeley v. Clinton*, 2 Meriv. 240, to be then depending. Benefit of rule extended to prowling assignee of equity of redemption.

in equity were to be governed by the course of the court, yet, as in the statute of the 21 James, c. 16, the legislature had adjudged it reasonable to limit the time of entry to that period, unless there were such particular circumstances as might vary the ordinary case, which were therein provided for, it was best to square the rules of equity as near the rules of reason and law as might be (*ce*).

Redemption refused after thirty-three years.

And the court refused to redeem after thirty-three years, although it was proved by one witness that, about *twenty-four years* before the then application to redeem, the mortgagee had told him he was fully satisfied (*y*), and paid all his demands upon the mortgagor (*f*).

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But the reporter says, that the court proposed, in respect of the badges of equity in this cause in favour of the plaintiff, to do something for the plaintiff which the defendant consented to.

Pleading.

In the case of *Chapman v. Boyer* (*g*), "That the mortgage had not been redeemed after twenty years forfeiture, and that the estate had descended to an heir who had sold the same," was, on pleading, held good.

No time a bar where there is fraud.

But, if there be fraud in the transaction, as if a mortgage be made by an absolute deed without a defeazance, no length of time will be a bar (*h*) (*z*).

(*ce*) [Does the statute of limitations apply to entails: a new title accruing to each succeeding tenant in tail?—*Ed.*]

(*f*) *Isham v. Cole*, 1 Ch. Rep. 128.

(*g*) 1 Ch. Rep. 206. Nels. 34. [et vide 3 Atk. 225.—*Ed.*]

(*h*) Ca. Temp. Talb. 63. et vide *Baker v. Wind*, 1 Ves. 160. [As to this, vide p. 120, ante.—*Ed.*]

Case in text questioned.

(*Y*) *Quære*, if in this case, supposing the court to have credited the fact, the mortgagee ought not to have been decreed to re-convey, not on the ground that he was mortgagee, but as being a trustee for the mortgagor, the mortgage upon his own admission being satisfied, according to the rule laid down in page 109, ante.

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Rule in text too general.

(*Z*) This rule (although expressed in the language of the court) is perhaps too general. It were probably more correct to say, that the twenty years will begin to run from the time the fraud is discovered. The case next cited in the

Thus, where A., for a small sum of money, mortgaged lands to B., and, to deceive the mortgagor, it was expressed that the redemption should be made with A.'s own money and in his life-time (i); A.'s necessities drove him abroad, where he died; B. afterwards devised the money, *if the mortgage should be redeemed*. On a bill exhibited to redeem, length of time was objected, forty years having elapsed; but the court decreed a redemption, saying, that there was fraud in the original agreement, for the words, *to be paid with his own money*, were thrown in to make A. imagine it could not be done otherwise.

Redemption decreed after forty-one years, on ground of fraud.

So, also, if there be any legal impediment affecting the person having a right to redeem, he may redeem after such impediment is removed, although the period limited by the court be past. For this being an equity founded upon the statute, no greater allowance is made in consideration of length of time, than the statute of limitation gives in cases coming within its letter (l).

Persons under disability may redeem after impediment removed.

Thus, where husband and wife mortgaged copyhold lands (of which she was seised to her and her heirs according to the custom of the manor) by surrender to the mortgagee, which,

Coverture.

(i) *Orde v. Smith*, Select Ca. in Ch. 9, 10. [and see last note.—Ed.] [See S. P. ante, 360 a, n. (S), and infra, 409, n. (X).—Ed.]

(l) *Cornel v. Sykes*, 1 Ch. Rep. 194.

text imports to be a decision on the ground of fraud alone; but that case contained another circumstance, which would have entitled the plaintiff to the relief he sought. It was true forty-one years had elapsed since the making of the mortgage; but the mortgagee had within the last twenty years taken notice of the mortgage in his will as an existing incumbrance and liable to be redeemed, and had actually demised the money away in case of that event. The Master of the Rolls noticed this circumstance, and said it was sufficient (distinct from the fraud) to entitle the plaintiff to a decree for redemption. See 2 Eq. Ca. Abr. 600, pl. 27. et vide 2 Sch. & Lef. 633. Nevertheless, it is a first principle of equity that length of time will not sanctify fraud. 1 Ridgw. P. R. 337. S. L. 2 Ves. jun. 280. et vide *Alden v. Gregory*, 2 Eden Rep. 285, where Lord Northington strongly marks his approbation of this latter doctrine: he is represented as saying, "The next question is, in effect, whether delay will purge a fraud—never while I sit here. Every delay arising from it adds to its injustice, and multiplies the oppression."

Time begins from discovery of fraud.

by non-payment, became forfeited; the mortgagee took possession, and disposed of them to his wife for life, with a reversion to the defendant and his heirs: afterwards the wife, the mortgagor, died [in the life-time of her husband], not having been able to redeem during her coverture. The lands were conveyed over. Then the plaintiff, her son and heir, applied to the mortgagee to redeem, and it was insisted that he ought not to redeem against the alienee of the premises, twenty-five years being elapsed; but the court resolved, that, in regard of the impediment in the plaintiff's mother, which prevented her redeeming during her coverture, the plaintiff ought to redeem, and decreed accordingly.

Impediment may be taken advantage of by amended bill or plea, but not by demurrer.

And the plaintiff, in a bill to redeem, may take advantage of such legal impediment on plea of the statute of limitation by way of reply, or by amending his bill (*m*). And for this reason Lord Hardwicke was of opinion, in the case of *Aggas v. Pickerell*, that if a bill was brought to redeem, and the plaintiff set forth that he had been long out of possession, and did not shew himself to be within any of the exceptions of the statute, you could not take advantage of that by demurrer; for the plaintiff might make it appear by way of reply, or by amending his bill, that he was within the savings of the statute, or, upon a plea, he might prove himself to be within the exceptions. But if it was to be allowed by way of demurrer, the bill would be out of court.

Twenty years having begun will continue to run, though disability intervene.

But, if the twenty years, considered in equity as a presumptive bar, begin to run, the intervention of a legal disability in the person having a right to redeem, will not prevent on the time going against him.

Fine having begun on ancestor will run on against infant heir.

Thus, where the plaintiff's father, in 1697, mortgaged the lands in question to the defendant, and in 1698, the mortgage being forfeited, the defendant brought his ejectment and recovered possession (*n*); and on a bill to redeem or foreclose, had

(*m*) 3 Atk. 225. [and see ante, 362, n. (U).—Ed.]

Knowles v. Spence, Mose. 225. [S. C. 1 Eq. Ca. Abr. 315; pl. 5. tit. *Infancy*.—Ed.]

(*n*) *Floyd v. Mansell*, Gilb. Rep. Eq. 185. *St. John v. Turner*, 2 Vern. 418.

a decree accordingly, which was assigned and enrolled in 1701. In 1702 the plaintiff's father died. The plaintiff continued an infant till 1709, when he came of age. In 1721 he brought a bill to set aside this decree, and be let into a redemption, on payment of principal, interest, and costs, suggesting therein that the defendant was much overpaid; that the lands were of greater value; that the proceedings in the decree were *ex parte*; and that there were many irregularities therein. The defendant answered to part, and pleaded the decree of foreclosure and inrolment; insisting, that it would be against practice to set aside a decree, signed and inrolled, by an original bill: and the Lord Chancellor dismissed the bill, but without costs, saying, that, in this case, the infancy of the plaintiff would not help him, the right to redeem not beginning in his time, but in his ancestor's; for, in all such cases, the party was barred, and had not twenty years after the impediment was removed.

And so it is, although there be a coverture or a tenancy by curtesy (o), yet if the time begin to run, the disability will not protect the equity of redemption (A).

Coverture.
Curtesy.

(o) *Anon.* 2 Atk. 333.

(A) Therefore if a *feme covert* afterwards becomes discover, the statute of limitations commences its restrictive period from that time, and runs against her, though she afterwards marry again. *Anon.* 2 Atk. 333. Hence it is not exactly correct to state, that the mortgagor cannot by his own act vary the contract with the mortgagee; for in a mortgage by a *feme sole*, who afterwards marries (which is her own act) and the mortgagee enters, his possession during the coverture, which may continue far beyond twenty years, will not bind the remainder-man; per Lord Manners, in *Blake v. Foster*, 2 Ball & Bea. 575, but his Lordship's argument, that in borrowing the limitation of the statute no satisfactory reason can be assigned for rejecting the most important provision in the act, namely, the period from which the adverse possession shall begin to run as against a remainder-man, did not prevail. See next page.

Coverture.

As to a tenancy by the curtesy, or any other tenancy for life, it was in one case argued, that since a remainder-man or reversioner of an equity of redemption might redeem a mortgage during the life-time of a preceding tenant for life, the time of the statute would run against such remainder-man or reversioner, notwithstanding the existence of several estates for life in the equity of redemption. This was contrary to the general rule, that a remainder-man or reversioner will not be barred of their estates if they claim within twenty

Tenant by curtesy of equity of redemption assigns to mortgagee, who is fifty years in possession, redemption opened under circumstances.

one principal ground upon which the court found their objection to redemption after a great length of time) being removed,

pressed very much on my mind in this cause; but as I understand, that in a case lately heard before Sir William Grant, he was of a contrary opinion, and that the same question is now before Lord Eldon, I shall therefore defer the decision of this part of the cause, until I am able to ascertain what will be the result of the opinions of those two eminent judges." 2 Ball & Bea. 576, 7. It is not added in the report what became of the case afterwards. However, the decision in the case alluded to by Lord Manners (*Cholmondeley v. Clinton*, infra, vol. ii. 1149) has settled, that the statute is not to be adopted throughout, and that the lapse of twenty years affords in equity a substantive insuperable plea in bar.

As to merger of charges.

As to the suspension of charges by their union with the estate out of which they accrue, the reporter, in a note to the preceding case (in *Anstruther*) remarks, "When the legal estate in land, and a legal charge upon it vest in the same person, for a time he is to be considered as in of the principal estate, and the charge is suspended for the time that the rights are united. In equity the estate of the mortgagor is considered as the principal, that of a mortgagee as a charge upon it; perhaps the latter ought to be considered as merging in the former, while they are in one person." Note to *Corbett v. Barker*, 3 Anstr. 755. A similar union of the equity of redemption with the right to the mortgage money, occurred in a case which was submitted to counsel in 2 Ca. & Opin. 44. The gentleman who gave his opinion, conceived, that when the equity of redemption in the whole fee vested in the person who had the whole right to the mortgage, they were so united together in equity, that the mortgage as well as the estate in the land passed by the will of such person to his devisee, who consequently, was entitled to both.—It is however, now considered to be settled, that if a person who is entitled to a sum of money, which is charged upon an estate and secured by a term of years, afterwards becomes entitled to the fee-simple of the estate, a court of equity will extinguish the charge and disburthen the estate of the incumbrance, except where there are creditors or infants. See further as to the merger of charges, Index, voce *Merger*.

Fine runs against remainder-man of equity of redemption during lifetime of particular tenant.

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In ordinary cases, the owner of the remainder or reversion is allowed a period of twenty years from the determination of the prior estate, in which to assert his title, and if he be then under legal disability he will be allowed ten years more for a like purpose after those disabilities have ceased. Supposing the case of a forfeiture of the preceding estate for life or years, the remainder-man may enter or bring an ejectment immediately, but he is not bound to do either. If he asserts his right within the period prescribed by the statute, after the remainder has fallen into possession by the regular determination of the preceding estate, it will be time enough, and the statute cannot be erected as a barrier to his pretensions for not coming within twenty years after his title accrued by the forfeiture. *Kemp v. Westbrook*, 1 Ves. 287. S. L. *Gore v. Stackpole*, 1 Dow. P. C. 18. This rule, it should seem, will not apply to the case of a remainder-man or reversioner where the estate is in mortgage, that is, where they claim under limitations of the equity of redemption; for the statute from which this rule is derived, has been held in-

no injury will accrue to the mortgagee in being obliged to receive back his principal, interest, and costs. And therefore, where the bill was to redeem a mortgage made in 1642 (*p*), it

(*p*) *Procter v. Cowper*, 2 Vern. 377. Trin. Term, 1700. S. C. [Pr. Ch. 116.—*Ed.*]

applicable (except by analogy) to equities of any kind. And it is particularly observable, that the grounds which induced the reversal of the case of *Corbett v. Barker*, were not such as may be considered in the least degree militating against the opinion delivered by Chief Baron Eyre on the first hearing of that case; namely, that the neglect of the heir of the *feme covert* mortgagor to redeem the estate during the life-time of the tenant by the curtesy, should bar him of his equity to do so on the death of such tenant for life, if twenty years have run against him since the accruer of his right by the death of the *feme* mortgagor. One great reason for reversing *Corbett v. Barker* arose from the union of the two characters of mortgagor and mortgagee in one person. If the tenant for life had not conveyed the equity of redemption to the mortgagee, but had continued tenant by the curtesy for the period of twenty years, and had permitted the mortgagee to remain in possession of the premises during that time, without calling for an account of the surplus rents and profits, or otherwise procuring an acknowledgment of the mortgage, then the question would arise, whether on the death of the tenant for life, such laches could be imputed to the remainder-man of the equity of redemption, in not redeeming during the twenty years as would bar him of a benefit, which in analogous cases would be extended to him. Lord C. B. Eyre was of opinion, that the remainder-man would be barred, because he had a right to redeem during the life-time of the tenant by the curtesy, and it was natural to suppose, that during that period he would be apprised of his interests and the nature of his rights. Besides, it was the estate of the mortgagee which was to be defeated, who was not to be fettered with the rights of third persons. The rule, said the Chief Baron (1 Anstr. 142) was, that if a mortgagee obtain possession, and a bill be brought to redeem in proper time he will be bound to account, but if no bill be brought within twenty years, nor any admission of holding in trust (as payment of part of the rents, &c.) his estate will be absolute, although it might be proved that he had received more than the principal sum before the twenty years were expired; and as to the remainder-man, the mortgagee is to be considered as any other mortgagee in possession.—Hence, therefore, we may adduce the rule to be as Lord Hardwicke stated it in the *Anonymous* case in Atkyns, cited in the text, that a tenancy by the curtesy will not be any excuse against the operation of this analogy to the statute, for it is of no consequence to a mortgagee, who has the equity of redemption. If they who are entitled to it, do not make use of their right within the limited time, they will be barred, otherwise there would be no bounds to a redemption, and no mortgagee could ever be quieted in his possession. The lapse of twenty years affords a substantive insuperable plea in bar, *infra*, vol. ii. 1153. Hence the right to an estate may be acquired in equity forty years sooner than at law.

appeared the mortgagee entered in 1650, and there were three descents on the defendant's part, and four on the part of the plaintiff; but the length of time being answered for, the greatest part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686 (B).

No stint to redemption.

(B) There is, in fact, no stint to the redemption, if interest be paid on the mortgage or it be in any other way acknowledged; per Lord Keeper, 1 Ch. Ca. 102; and a court of law will presume that interest has been paid for thirty-seven years even, if the special verdict expresses nothing to the contrary, *Hall v. Doe*, 1 Dow. & Ry. 340. *infra*, vol. ii. 1156. So, if a mortgagee conveys, subject to the equity of redemption, that right may be kept alive for any length of time. *Doe v. Parratt*, 5 T. R. 655. And a mere private account kept by the mortgagee of the profits of the estate, in which he treats the estate as redeemable, will be a sufficient circumstance whereon to decree a redemption if it can be fairly proved. *Fairfax v. Montague*, 2 Ves. jun. 84, cited; *Campbell v. Beckford*, 4 Ves. 474, cited.

Promise of account equal to account stated.

In the margin of the editor's fourth edition of *Powell on Mortgages*, it is said, that the promise of an account within twenty-years will have the same effect as an account stated and settled, and a case of *Lutterell v. Lee* is referred to, for which the editor has diligently searched, but as yet without success. The cases cited in the next note but one, sufficiently confirm the position, that in equity, the promise of an account will be equivalent to an account stated. How, indeed, can there be a promise to furnish an account without an admission that there has been an account kept which is still unsettled. At law it has been held, that a promise by a defendant to pay a debt by instalments when he is able, will be sufficient to take the case out of the statute of limitations, without proof of time being given, or of the ability of the party to pay, *Thompson v. Osborne*, 2 Stark. 98, over-ruling *Davis v. Smith*, 4 Esp. 36; and there appears to be no well-founded reason why a court of equity should depart from its usual analogy and adopt a different rule. So again in *Gibbons v. M'Casland*, 1 Barn. & Ald. 690, a verbal promise of account, or in other words, a promise that the matter in dispute respecting a debt should be arranged, was held a sufficient acknowledgment of the debt to take the case out of the statute of limitations. It was argued, that the acknowledgment should have been in writing; but the court said that a written promise was not necessary; for the defendant's liability was fixed by the original promise in writing, and the subsequent acknowledgment within six years, was only to shew that the liability had not been discharged. See also, on this latter subject, *Leaper v. Tatton*, 16 East, 420. *Hellings v. Shaw*, 1 J. B. Moore, 340. S. C. 7 Taunt. 608. *Whitehead v. Howard*, 2 Brod. & Bing. 375. *College v. Horn*, 3 Bing. 119, and the cases therein respectively cited. But it should be observed that a promise or acknowledgment by a wife after marriage would not be available, at least as far as regards a promissory note,

And an account settled between the mortgagor and mortgagee within the time limited, although there be no bill filed, *although no bill filed.* will preserve the mortgagor's right of redemption.

Thus, where a mortgage was made in 1713 (*q*), and the clerk to the solicitor for the mortgagor, in order to pay off the mortgage, settled an account in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by Lord Hardwicke, on application in 1742, to save the right of redemption.

But, although there be a decree to redeem, and an account, yet, if it be suffered to lie dormant, and be not prosecuted

(*q*) *Anon.* 2 Atk. 333.

But account or decree to redeem lying dormant twenty years, equity of redemption barred (c).

and if she has been married more than six years, the statute of limitations may be pleaded notwithstanding such promise. *Pittam v. Fortis*, 1 Barn. & Cress. 248. In *Frost v. Bengough*, 1 Bing. 266, where the statute was pleaded, the plaintiff put in evidence a letter, wherein the defendant said, "Business calls me on the sudden to Liverpool, should I be fortunate in my adventures, you may depend on seeing me in Bristol in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters besides the promissory note in question to which the letter could refer: this was held to be a sufficient acknowledgment to take the case out of the statute. So in another case, an acknowledgment by a joint maker of a promissory note, was held to revive the debt against a surety even. *Perchain v. Raynal*, 2 Bing. 306. But where A. & B. gave a joint and several promissory note and A. died, and ten years after his death, B. paid interest upon the note, in an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable. *Atkins v. Tredgold*, 2 Barn. & Cress. 23.

The twenty years begin to run from the time at which the account or promise is given, for by giving or promising the account, the mortgagee admits that he holds in that character. In *Edsell v. Buchanan*, 2 Ves. jun. 84. the court said, that there were many instances in which redemptions had been opened after twenty years, where the mortgagees had treated their securities as redeemable, by keeping accounts during that period. The long case on this subject before Sir Thomas Sewell, spoken of by the Lord Chancellor, in *Edsell v. Buchanan*, and in which his Lordship said he was of counsel, was probably that of *Lutterell v. Love*, *supra*.

From what period time begins to run.

(C) In a case of *Giffard v. Hort*, which came on in the Exchequer, 1 Sch. & Lef. 407, n. (a), a bill was filed in 1763, and another in 1798, after a lapse of thirty-five years. This latter bill was considered as a continuation of the

Dormancy of suit thirty-five years.

within the time limited, the mortgagor and his heirs will be barred. Thus, where A., in 1639 (*r*), demised the lands in

(*r*) *St. John v. Turner*, 2 Vern. 418.

suit commenced in 1763. But in regard no steps had been taken in the cause for so long an interval, (particularly for a space of twenty-five years from the time of the then plaintiff's coming of age, during which time the Hort family were in possession, acting upon the estate as absolute owners, and did not appear in any instance to have treated it as a pledge,) the court held, that the equity of redemption was barred.—Some doubts however have since been thrown out on the authority of this case by Lords Redesdale and Manners—the latter assigning the reason to be, that there was so much business at that time in the court of Exchequer, that due attention could not be bestowed on all its decrees, 2 Ball. & Bea. 405. 1 Dow. P. C. 18. In *Cane v. Allen*, 2 Dow. 289, a suit proceeded as far as bill, answer, and replication, but after that no further steps were taken in the cause for upwards of twenty years. The House of Lords however adjudged that this alone was not enough to warrant their Lordships in refusing a specific performance, there being acquiescence on both sides, but held it a good reason for withholding costs where otherwise they would have been given.

*Delay through
embarrassment
for twenty years
no bar to re-
newal of suit.*

The subject of dormitory suits has since occupied the attention of the House of Lords for several days on a question, whether a bill filed by the mortgagor for redemption was rightly dismissed by the court below for want of prosecution. The circumstances of the case were these:—In the year 1770, the mortgagor was in possession under his equitable title (the mortgage being for the whole term of the lease), and continued so in possession till the year 1781, when he was ejected by a purchaser claiming under the mortgagee. The mortgagee had lent further sums to the mortgagor on judgment, and had afterwards conveyed the lands, and assigned the judgments to one C. the ejector, who issued out writs of *fieri facias* on the judgments; and, in 1781, procured a sale from the sheriff of the mortgagor's equitable interest, under circumstances of the grossest fraud. In 1782 the mortgagor filed a bill in chancery for relief. But from embarrassment in his circumstances did not further prosecute the suit till 1801, when he filed an amended bill for revival of the suit, which was dismissed by Lord Manners in 1808, on the ground of delay (1 Ball & Be. 63). To this decree of dismissal the mortgagor appealed; and the case coming on in the House of Lords, Lord Eldon observed, that their Lordships were to consider whether there was any thing to bar the relief on the authority of those cases—not of the cases which justified a dismissal on the ground of not commencing a suit in due time—but of those cases which justified a dismissal on the ground that, though begun in due time, it had not been prosecuted with due diligence; and his Lordship thought the present case did not fall within that principle. The equity of redemption was never foreclosed, yet the respondent might at any time have moved to dismiss the bill. Lord Eldon could not therefore understand the ground on which the not prosecuting the suit with due diligence had been in this case considered as a bar to the relief. There never was any motion to dismiss the bill for want of prosecution, and

*Mortgagee in
that time, could
have moved for
dismissal of bill.*

question to B. to counter-secure him against debts, for which B. stood bound as security to the amount of 4000*l*. In 1649,

the case did not appear to fall within the principle on which length of time was a bar; and consequently, if after hearing the noble Lord (Redesdale) who was much better acquainted with Irish proceedings than himself, it should appear that he (Lord Redesdale) was of the same opinion, the decree could not stand.—Lord Redesdale, after stating the case, observed, that if Blake the purchaser of the mortgage had been desirous to foreclose for non-payment of the money lent, and had, as he might have done, under the Irish statute, tacked the judgments to the mortgage, he might have filed a bill for that purpose, and then the mortgagor would have had a limited time appointed, within which he must have paid the money, or, if not, he would have been foreclosed. But, instead of that, Blake took a different course, which could not be sustained, that was, he resorted to the sale of a right to a suit in equity, and it would be of dangerous consequence if such transactions could be supported, for it would then be impossible for mortgagors, who had judgments against them, to sell the equity of redemption of the mortgage property. The only question was, as to delay. The bill was filed the moment Blake executed this contrivance, [which was in fact a sale of the right to foreclose, and consequently an acknowledgment of the mortgage] and therefore there was no undue delay in *filing* the bill, as it was filed before Moore was turned out of possession under the ejectment, and before Blake had entered into possession. There was delay in *prosecuting* the suit. But then Blake might have moved to dismiss the bill for want of prosecution. He suffered the matter to rest however until Moore proceeded with it, and obtained a decree. When the case came on for a re-hearing Lord Manners dismissed the bill. It was stated, that the ground of that decision was the delay in prosecuting the suit. But if there were no other ground, Lord Redesdale thought that ground did not apply. The decision of Lord Manners was accordingly reversed, and the mortgagor permitted to redeem on payment of the debt, interest, and costs. *Moore v. Blake*, 4 Dow., P. C. 230.

Sale of right to file a bill of foreclosure, a nullity.

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It is further observable, that an *infant* will be bound by *laches* in a suit. But Lord Erskine would not say, that the rights of the persons entitled to the inheritance were bound by the acts or laches of the preceding tenants for life, as they were by the acts or laches of tenants in tail; yet, on the other hand, his Lordship said, it was an alarming proposition to hold, that there could be no *quietus* for any person, absolved from any duty or obligation by a proceeding in a cause that had all legal parties to it, until by the course of nature and human events no person, not then existing, could possibly come into the world with rights, not concluded by the parties to the suit. *Shipbrook v. Hinchinbrook*, 13 Ves. 396.

Infant suitor bound by laches.

Lastly, note, that after the lapse of three terms without any proceedings in the suit, an order may be obtained to dismiss the bill for want of prosecution; and this is a motion of course, and no notice is necessary to be given of such a motion to the other party. *Jackson v. Purnell*, 16 Ves. 204. *Naylor v. Taylor*, *ib.* 127. *De Graves v. Lamb*, 15 Ves. 291; and 2 Madd. Ch. 384, 2d edit.

Of motion to dismiss bill.

B. entered on his security, and, by will, devised certain sums out of it to his daughters, and the rest to his sons. In 1662, the executors allotted the lands among the children of B. according to their respective proportions. In 1663, a bill was brought by the heir of A. to redeem, and thereupon a decree was made to account. The heir died. Afterwards the suit was revived by A.'s daughters, who were co-heiresses, and in 1672 an account was again decreed. The plaintiff being of the same name as A., purchased the equity of redemption of the lands in question from the co-heiresses, and, in 1700, brought his bill to redeem, and to have the benefit of the former decrees. But the Lord Keeper dismissed the bill, and would not allow the plaintiff to redeem, by reason of the difficulty of accounting after so great length of time, especially as the mortgagor had himself acquiesced from 1639 to 1663, and neither paid the debt nor sought a redemption; for, though a decree had been obtained, it was not prosecuted (D).

Demand of account without process or acknowledgment, no avail.

(D) With respect to an acknowledgment of the mortgage by means of an account, it is further observable, that the mere demand of an account, although frequently repeated, will not alone be sufficient to prevent the effect of length of time in analogy to the statute. In one case, the present Master of the Rolls, then Vice-Chancellor, observed, that the question was, whether the bill in the case before the court stated any thing against the defendant which amounted to a recognition of his character as mortgagee. It stated, that in 1784 he did in fact hold as mortgagee, and was accountable as such, that the plaintiff had the equity of redemption, and made frequent applications for an account; but the mere demand of an account, his Honor said, was not alone sufficient to prevent the effect of the length of time. It had, indeed, been represented as equivalent to actual entry, which was sufficient to keep alive the right of a person disseised; but a mere demand of a debt, without process or any acknowledgment, was not sufficient to take the case out of the statute of limitations. *Hodle v. Healy*, 1 Ves. & Bea. 546.

So of the mere delivery of an account.

So the naked fact of the delivery of an account without evidence of contemporaneous or subsequent conduct, affords no sufficient legal presumption of an acknowledgment of the debt. *Irvine v. Young*, 1 Sim. & Stu. 333. But where, upon a demand made, the answer was, "I will not pay you unless I am obliged," this was held a sufficient acknowledgment to take the case out of the statute of limitations, *Dowthwaite v. Tibbut*, 5 Man. & Selw. 75. The statute of limitations begins to run against an administrator from the time of administration granted. *Murray v. East India Company*, 5 Barn. & Ald. 204.

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Time not prevented by a receiver's account,

In another case, *Barron v. Martin*, Coop. Rep. 189, where several communications by letter and conversation, respecting the paying off the mortgage and the purchase of the equity of redemption, had from time to time, during

But there is a species of contract which partakes of the nature of a mortgage, in as much as there is a debt due, and an estate as a security for the re-payment, but differs from it, in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and that there is no remedy to enforce the payment. This is called a Welch mortgage, and implies a perpetual power of redemption subsisting for ever, and the mortgagee cannot compel a redemption or a foreclosure (E).

Welch mortgage, perpetual redemption.

a period of sixty years, been made by and between the mortgagor and mortgagee and their representatives, the late Master of the Rolls said, it was unnecessary to consider the effect of any of the transactions which had taken place before the last twenty years prior to the filing of the bill, and the only circumstance which happened within that time was an account of the rents and profits delivered to the mortgagor, at his request, by the receiver of the mortgagee, and which account the receiver himself admitted, on his cross-examination, was given without the direction or authority of the mortgagee, he being at the time of unsound and disordered mind, and incapable of managing his own affairs. If the account had been delivered by the mortgagee himself, supposing him competent, it would certainly have been sufficient, according to the principles of that court, to entitle the plaintiff to redeem. But the receiver was only a manager of the estates, and could not by delivering such account bind his employer, who had given him no authority so to act. It was not even argued as constructively the act of the mortgagee, but only as amounting to evidence that the mortgagee had kept mortgage accounts. But Sir William Grant thought that the evidence in the case did not afford any inference, that accounts had been kept within the last twenty years. It would have been easy, his Honor said, for any person who knew what the debt was, to have made out such an account as the receiver did. There was, it was true, something like an account, but it had been kept only as between a receiver and a land owner, with this sole difference, that it was entered in a book by itself; that circumstance Sir William Grant considered as insufficient to give a right of redemption, and therefore dismissed the bill but without costs.

furnished without mortgagee's authority.

(E) Welch mortgages are a species of the *vivum vadium* mentioned by Glanville (Lib. x. c. 6.) and by Lord Coke, ante, p. 3. Strictly, however, there is this distinction between a Welch mortgage and the *vivum vadium*:—In the *vivum vadium* the rents and profits of the estates are applied in discharge of the principal, that is, the creditor takes actual possession of the estate in virtue of a feoffment or other assurance, and receives the rents and profits, applying them from time to time in liquidation of his debt, until he is satisfied. In the Welch mortgage the rents are received by the mortgagee, in satisfaction of the interest only, with an understanding, that he is not to be accountable for the same (*Talbot v. Brady*, 1 Vern. 395), while the principal is left to be paid off by the mortgagor or his heirs at any time. This distinction is

Economy of Welch mortgage.

Proviso to pay money on any Michaelmas day, gives everlasting right to redeem.

Thus, where there was a proviso in the deed (s), that if the mortgagor, or his heirs or assigns, should, on a Michaelmas

(s) *Howel v. Price*, Pre. Ch. 423. S. C. 1 P. Wms. 291. 2 Vern. 701. [and post, 685.—Ed.]

often disregarded, though in the case next cited in the text it appears to have been attended to; and perhaps, after all, there are greater marks of resemblance between a Welch mortgage and the old security of *mortuum vadium*, than between such a mortgage and a *vivum vadium*. This last sort of mortgage is called in the Roman law *Antichresis*. Justinian gives this example: "*Si arrigens, id est, mutui pignoris usus pro credito facta sit, et in fundum aut in aedes aliquis inducatur, eoque retinet possessionem pignoris loco, donec illi pecunia solvatur. Cum in usuras fructus percipiat, aut locando, aut ipse percipiendo, habitandoque.*" Pand. lib. xi. s. 1. ff. *de pign. et hyp.* The *Antichresis* of the Roman law is deemed usury in France (see Domat's C. L. tom. i. lib. 3. t. i. s. 1.), but with us it is allowed, because the mortgagee is to render an account for all that he receives beyond his principal and interest at 5 per cent. The surplus of the rents are to be yearly applied in paying off the principal, or more properly to be paid over to the mortgagor; and the mortgagee when called on for an account is not to be allowed interest on interest.

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Irish lease and loan, in nature of Welch mortgage.

Welch mortgages (notwithstanding the apparent discrepancy in terms) were formerly very common in Ireland. Indeed, they were said to have been the ordinary mode of mortgage. *Hartpool v. Walsh*, 5 Bro. P. C. 275, Toml. ed. There are still many traces of this species of security to be found in that part of the kingdom. Up to a late period, a plan very prevalent was for the borrower to grant a lease to the lender at a stipulated rent, with an indorsement, that on payment of the sum borrowed, the lease should be void. The lender then entered into possession of the estate and received the rents, setting them off annually against the interest, and submitting to be redeemed when called on. Lord Redesdale's decisions, however, cut up this mode of security root and branch. He said, he would not suffer the loan of money to be an inducement in transactions of this kind. In *Drew v. Power*, 1 Sch. & Lef. 182, his Lordship held clearly, that a beneficial lease, obtained under the influence of a loan of money, made or expected to be made by the lessee to the lessor, was a fraudulent evasion of the statutes of usury, and an undue advantage taken of the lessor, and therefore void; and in *Webb v. Rorke*, 2 Ibid. 661, his Lordship further decided, that a lease for nine hundred and ninety-nine years, made by a mortgagor to a mortgagee, should be set aside, as against the policy of the law on which the statutes of usury were founded; and this, as it should seem, although the lease were made at a fair value. But Lord Manners said, he could not go to the full extent of that proposition. He thought a dealing might take place between the mortgagor and mortgagee, which the court would support. Suppose, for instance, he observed, a mortgagor agreed that the mortgagee should enter into possession of lands not before let, and account for their value at an indisputably fair and stipulated rent, in discharge of the debt, could that be against public policy, or did it work a private injury? Such an instance was in substance like a Welch mort-

day named in the deed, or any Michaelmas day following, pay to the mortgagee, his heirs or assigns, the mortgage money,

gage, wanting form ; and the best evidence that the transaction was a fair one, was the mortgagor's acquiescence in the lease for nearly twenty years without complaining. From that circumstance the court would conclude, that the bargain was a fair one : and his Lordship further remarked, that he was aware that when a mortgagee took possession, he was liable to account for the full value ; but he thought, that if there were such an agreement as the one he had supposed, it would form an exception to the rule. *Morony v. O'Dea*, 1 Ball & Bea. 111—118 ; and for further, see *infra*, vol. ii. p. 1079. This latter observation of Lord Manners contains a precise description of one of the leading features in a Welch mortgage, and shews what a striking resemblance exists between the Irish lease and loan and the Welch security. As to the inference drawn from acquiescence, a recently decided case in the House of Lords has minutely confirmed the above stated deduction. Acquiescence, it is there observed, for a long time, is material evidence to shew that a contract is fair, though it is of that kind which courts of equity look at with jealousy. 4 Dow P. C. 24.

Presumption from acquiescence.

It is further observable, that all Welch mortgages are without a covenant for payment of the money, *Lawley v. Hooper*, 3 Atk. 280. *King v. King*, 3 P. W. 360, but as every mortgage implies a debt (*ante*, p. 16, *in notis*), it is fair to presume, that an action of debt will lie for the money. The case of *Howell v. Price* seems *contra*, on the ground perhaps, that a mortgage of this description proceeds less on the security of a loan than it does on the consideration, that the transaction is in the nature of a conditional purchase. But although the mortgagee may not be able to compel the immediate payment of his money by foreclosure or other means in equity, yet the mortgagor may at any time pay off the mortgage, and compel the mortgagee to accept of his principal, interest, and costs, and call on him for a re-conveyance of the estate. It is also open to remark, that notwithstanding an express agreement between the parties, that the mortgagee shall retain the rents and profits in lieu of the interest, thereby exempting him from all liability to an account, yet if the amount of such rents and profits be excessive, the court will, at the instance of the mortgagor, decree an account. *Fulthorpe v. Forster*, 1 Vern. 247. *Post*, *etiam*, vol. ii. 946, 7.

Welch mortgage without covenant for payment of money, relieved against.

Account directed, when.

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Welch mortgages are now in little use. They are ill adapted to the purposes of pledge. The object of the party borrowing, is to be accommodated with a loan, and not to part with his estate. The object of the party lending, is the repayment of his money in an entire sum, not by instalments, or by the troublesome mode of collecting rents ; neither of which objects will the Welch security effect. These prominent inconveniences, render it a mode of security rarely adopted. A form will be added in the Third Volume, more perhaps as a matter of curiosity than as a thing of real use. An instance of this kind, however, recently occupied the attention of the Editor, and much difficulty was created for want of a proper instrument, evidencing the real wish and attention of the parties. A counterpart of the mortgage would be of much service to the mortgagor, who, on entering into the agreement, usually relinquishes

and all arrears of interest which should be then due, then the conveyance was to be void; it was held to be in the nature of a conditional purchase, subject to be defeated on the payment of the sums stipulated at any Michaelmas day at the election of the mortgagor or his heirs; and that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages: and that therefore there could be no equity of redemption, or any occasion for the assistance of the court, but the mortgagor might, even at law, defeat the conveyance by complying with the terms and conditions of it, which were not limited to any particular time, but might be performed at any Michaelmas day to the end of the world.

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No time a bar
to the redemp-
tion of a Welch
mortgage (F).

So where there was an agreement (t) that the mortgagee should hold the premises until he was satisfied, time was held

(t) *Orde v. Heming*, 1 Vern. 418. [S. L. *Lockwood v. Essex*, 9 Mod. 276. —Ed.]

his title deeds, and other evidences of his right. So that in the course of years, nothing more than a vague traditional account of the transaction, remains with his family. See also the case of *Fenwick v. Read*, introduced in note (G), post, 377, for a recent decision on this subject.

Bristol bar-
gain relieved
against.

Somewhat similar to a Welch mortgage, is what is called a *Bristol bargain*. An instance of this occurred in *James v. Oades*, 2 Vern. 402, where the plaintiff, being possessed of a reversionary term for thirty-six years, to commence from the year 1700, of the value of about 200*l. per annum* when in possession, in the year 1683, applied to the defendant, a scrivener, to lend him the sum of 200*l.* which the defendant agreed to do, on having the said reversionary term assigned to him, defeasanced to be void on payment of 40*l. per annum*, for eight years by quarterly payments, which was accordingly done. In Michaelmas Term, 1700, the plaintiff filed a bill to be relieved of this agreement, on payment of principal, interest, and costs. The defendant insisted to have the benefit of his bargain, and interest from the time of each quarterly payment, and the rather because he lent his money in 1683, on such a remote reversion. *Sed per cur'*. What is usually called a Bristol bargain, is twenty pounds *per annum* for seven years for one hundred pounds; but this goes beyond it, and is extended to eight years, viz. one hundred and sixty pounds for every hundred, by twenty pounds *per annum*, and should it be allowed of, it might be carried to nine years, and so on without any stint or bounds; and the court declared it to be an agreement against conscience, and decreed a redemption on payment of the two hundred pounds with simple interest at 6*l. per cent.*

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Bill to redeem,
after fifty-three
years possession

(F) So in *Longuet v. Scammon*, 1 Ves. 406, Lord Hardwicke said, in a Welch mortgage, there is a perpetual power of redemption in the mortgagor subsisting for ever. The case of *Asherley v. Roe*, 3 Ves. 565, affords an instance

to be no bar to the redemption: *not* even though it appeared by the plaintiff's own shewing that *sixty years* were elapsed.

of the application of this rule. There lands were by indenture of lease and release and fine, settled on one Acherley and Ann his wife, for their lives, and the life of the survivor of them, with remainder to the heirs of the body of Ann Acherley, by her said husband, with remainder to the heirs of the body of Ann Acherley, with remainder to trustees, their executors, &c. for a term of 200 years, with remainder to Richard Acherley the husband, his heirs and assigns for ever. The trust of the term was declared to be, that if Ann Acherley should in her life-time, either during coverture or afterwards, by will, or any deed or writing, dispose of any sum not exceeding 1000*l.*; and Richard Acherley, his executors, &c. should not pay such money and perform such will, then the trustees, out of the rents and profits of the premises limited to them for the said term, or by sale or by demise thereof, should raise so much as Ann Acherley by such will, deed, or writing, should limit, give, or bequeath, and pay the same according to such will, deed, or writing. Ann Acherley survived her husband, and disposed of the 1000*l.* to A. B., who, on her death, entered into possession of the premises, and continued in such possession up to the time of filing the bill, a period of fifty-three years. It did not distinctly appear, whether A. B. entered into possession of the estate with the concurrence of the reversioner expectant on the term, (who was the heir at law of Richard Acherley,) nothing but hearsay evidence being adduced as to that fact. The defendant was the representative of A. B., who during his possession had treated the estate as real property, and had devised it and all his interest therein to several persons, which ultimately devolved on the defendant. It is observable, that the term was in trustees; and A. B. had nothing but the trust of the money. The plaintiff was the heir at law of Richard Acherley. The bill charged, that the defendant and his ancestors, entered into possession of the premises with the *consent* of the reversioner; that the rents and profits had been applied in discharge of the 1000*l.* which was long since fully paid; and prayed an account of the surplus rents, an assignment of the term of 200 years, and delivery of the premises. It was argued for the plaintiff, that the defendants could not shew any title, except under the term of 200 years; that there was no doubt, the plaintiff could recover at law, if the term were expired; that it was precisely the case of an *elegit*; that as to the inconvenience of accounting, that was considered by Lord Hardwicke, in *Yates v. Hambly*, 2 Atk. 360, and in another case, where Lord Camden found the inconvenience of directing the account, but the interest being clearly redeemable, he directed the account from the time of filing the bill, and the rents to be set against the interest. The defendants relied on the length of time; comparing it to a mortgage; insisting on the adverse possession; and contending, that a conveyance might be presumed. The Lord Chancellor said, it was vastly inconvenient and mischievous to allow a reversioner to lie by, and to come after a great length of time, when there must of necessity be great difficulty in taking the account, and say, the charge under the term was satisfied; at the same time he did not know how to deal with it. This bill was filed to redeem a term of years, created by a voluntary settle-

by person entering to receive debt out of rents, decreed under circumstances.

Inconvenience of accounting.

Conveyance to A. till he receives 50l. out of rents—twenty years possession after money paid, a bar (G).

So where A. in 1699 (u), having borrowed 50l. of B., conveyed several houses to the use of B. and his heirs, until he should have received by the rents and profits thereof the 50l. with interest, and all other sums by him advanced to the mortgagor(uu); and after payment by such rent of the 50l. and all

(u) *Yates v. Ambly*, 2 Atk. 360.

wicke said, he saw no difference be-

(uu) [This perhaps is not strictly between this and the common Welch a Welch mortgage; but Lord Hard- security. 2 Atk. 363.—Ed.]

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Legal estate in one, money in another, latter in possession, time no bar.

Case confirmatory of doctrine in text.

Circumstances thereof.

ment, after a possession by the defendant and those he represented for fifty-three years, and also several years after the commencement of the plaintiff's title. Certainly no demand could be more unfavorable. It had been argued, continued the Chancellor, that it was to be considered as a mortgage. But a proper mortgage was totally different. That was a security upon a contract between the parties; and the mortgagor in the deed covenants to pay the money at a certain time; and in default of payment by his express covenant, and the effect and operation of the deed at law, the estate vests absolutely in the mortgagee. There is an estate therefore. A legal title is gained. It is absolute at law; and it is only by the indulgence of the court, limited in point of time, that the redemption can be kept open. In this case there was nothing but possession. The defendant has no estate, but a mere possession. As being entitled to the interest of the money, he was let into possession of the rents. The term was not in him; he had no legal title. The term was in the trustee. Therefore if the plaintiff choose to prosecute his right, Lord Rosslyn said, he must hold him entitled under the circumstances. But he was bound to add (in favor of the defendant), that the neglect was so strong, that undoubtedly no account should be decreed, for the purpose of ascertaining, whether the rents were so improved as to have sunk the principal of the money. His Lordship was bound to hold that the 1000l. was due, but he would not even carry it back to the filing of the bill. The decree was accordingly.

(G) This doctrine has been confirmed by the recent case of *Fenwick v. Read and Clavering*, 1 Meriv. 114, wherein the court fully recognized the mode of security by Welch mortgage; and held, that time was no bar to redemption in instances of this kind, unless twenty years have elapsed after payment of the principal and interest by perception of the profits. The circumstances of the case were these:—

A. B. being indebted to one Rooke in respect of several sums of money, for which Rooke had obtained judgment against him, did, by agreement dated the 18th of April, 1747, agree "to yield up and deliver unto Rooke, his executors, &c. the possession of all and singular the lands and tenements" therein mentioned, "by delivering possession thereof to Joshua Douglas, the attorney of the said Rooke, to hold the said lands and tenements to Rooke, his executors, &c. as his freehold, until he should have levied and received the amount of his said judgment debts, &c." In pursuance of this agreement, possession was given as therein mentioned, and Rooke entered into receipt of the rents and profits accordingly, and continued in such possession till the 13th October, 1752, when by indenture of assignment of that date, he trans-

such sums as should be advanced, then to the use of A. for life, with remainder over, and no application was made to redeem until 1740; it was held, on a question whether this mortgage might be then redeemed, that the estate was then a redeemable interest, and that no bar arose from length of time.

ferred and set over to one Reed, (who was the ancestor of the defendant and a creditor also of the said A. B.) his executors, &c. all the said lands and tenements, with the rents in arrear, and assigned to Reed, his executors, &c. his said judgments, and the remainder of the debts due thereon, appointing Reed his attorney to prosecute upon the said judgments. Reed entered into possession by virtue of this assignment; and he and his representatives continued in receipt of the rents and profits from that time up to the time of filing the bill. The defendant was his grandson. In 1767 A. B. died intestate, leaving a son and heir at law, who died in 1797, having devised all his real estate to the plaintiff (Fenwick) and another, in trust to sell, for the payment of debts, &c.

A bill was filed in 1800 by Fenwick for an account, and to be let into possession, alleging the said agreement and assignment, and charging that the defendant Reed had kept *mortgage accounts*, and that the debt was then fully satisfied out of the rents. The bill further prayed the delivery up to the plaintiff of all the title deeds and writings, relating to the estates in question, together with various other papers relative to the said transaction between A. B. and Rooke, deposited in the hands of the aforesaid Joshua Douglas, to be by him kept and preserved for the benefit of the parties interested, charging, both with respect to the agreement of 1747 and the assignment of 1752, that if the same were not now in the possession of the defendant Reed, the same or one of them, or a counterpart or an attested copy thereof respectively, or one of them, together with various other title-deeds and papers relating to the said premises, were in the custody or power of the other defendant Clavering, as the personal representative of Joshua Douglas, with whom the same were so originally deposited; and that Clavering ought to deliver up the same to the plaintiff: but that the plaintiff having applied to him for inspection, he, Clavering, had positively refused to deliver the same to the plaintiff, or to furnish him with any copies thereof, or with a list or schedule, alleging, that he so refused, at the express instance of the defendant Reed, who had undertaken to indemnify him. The bill prayed neither discovery nor relief against Clavering, other than the delivery up of the title-deeds so alleged to be in his possession. The defendant, by his answer, denied the circumstances from which it was attempted to be inferred, that he had treated the transaction as a mortgage; and insisted, that from the length of time, a release of the freehold ought to be presumed. He denied his belief of any agreement between his ancestor and A. B.; and alleged that he entered into possession of the premises merely as creditor, having a right to redeem, against Rooke. He admitted the assignment in 1752 to be in his possession; but said he had no knowledge of the agreement of 1747, except from the *recitals in the assignment*. The defendant Clavering said, that he was a stranger to the matters in the bill, otherwise than by sundry drafts or copies of deeds, letters, and papers, which came into his possession after the death of his testator, who was the

*Bill, answer,
and proceedings.*

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For it was said, that this differed from a common mortgage, this being a conveyance of the inheritance for securing the money lent, or any other sum advanced by the mortgagee, in trust that the mortgagee should continue in possession till, by perception of the rents and profits, he should be satisfied the principal and interest upon such sums as he had already lent, or should lend, and subject thereto in trust for the mortgagor, &c. Now there never could be a forfeiture under this deed, because the mortgagee was only in the nature of a tenant by *elegit*; and as soon as his principal and interest was satisfied by being paid off, or by perception of rents and profits, the estate ceased in B., and A., or those claiming through him, might have brought an ejectment; nor would any bar have arisen from length of time, unless the statute of limitation had run by the mortgagee's continuing in possession twenty years after the money had been paid off. And the mortgagor in such case may also come into a court of equity for an account of the profits received, as on an *elegit*, and to have the surplus, if any, after discharging the mortgage, paid over to him; and in such cases there is nothing for the statute of limitations or the rule adopted in equity by analogy to operate upon, for there is no forfeiture.

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executor of Douglas; and which deeds he the defendant Clavering was ready to produce as the court should direct, submitting, whether, inasmuch as the said Joshua Douglas was the confidential attorney of Reed, by whom the said drafts and papers were delivered to the said Douglas, he, Clavering, ought or ought not to set forth a list of such papers, or to leave the same in the hands of his clerk in court. The bill was amended from time to time till 1816, when the cause came on to be heard on a motion by the plaintiff, that the defendant Clavering might leave with his clerk in court the several drafts or copies of deeds, letters, and papers, relating to the matters in the pleadings mentioned; and admitted by his answer to be in his custody, with liberty for the plaintiff to inspect the same, and take copies, &c. To this it was objected, that the executor of an attorney could avail himself of the attorney's privilege not to disclose any matters relating to the concerns of his client; and on this ground the motion was resisted.

Judgment of
court.

Possession of
papers by at-
torney is posses-
sion of his
client.

Lord Eldon, in the course of the cause, and in delivering his judgment, remarked, that this transaction appeared to be in the nature of a Welsh mortgage, to which *time would be no bar*: that it was very different from the case in which a day was fixed for redemption, where the equity was gone for want of redemption. That supposing the plaintiff to have retained his right to redeem against Reed, that defendant when called on for a production of papers could not be admitted to say, that the papers were not in his own pos-

But it was observed, in the preceding case, that if after the account should be taken in Chancery, it should appear that the mortgage was satisfied by perceptions of profits twenty years before, and that the mortgagee had continued in possession from that time, the statute of limitations would run.

But, in the case of *Hartpole v. Walsh* (x), where H. in consideration of 600*l.* lent him by W. conveyed estates to him in fee, subject to a proviso, that "the conveyance should be void whenever H., his heirs, executors, administrators, or assigns, should, on any last day of June or December, pay unto W. or his heirs, the sum of 600*l.*;" and it was agreed by the indenture, that W. and his heirs should receive the yearly rent of the premises in lieu of his interest, with a view to which possession was delivered to him; and afterwards H., in consideration of 2300*l.* paid by W., granted and conveyed the premises comprized in the former mortgage, together with others, to him, his heirs and assigns, and covenanted that, whenever W. should give to him, his heirs or assigns, eighteen months notice in writing, requiring payment for the 2300*l.*, H.,

Mortgagor to pay money on any eighteen months' notice. Bill by his heir 100 years after dismissed, because mortgages had been in possession that time, and had long since given notice.

(x) *Hartpole v. Walsh*, 4 Bro. P. C. 369. [5 Toml. edit. 275.—Ed.]

session or power, from the fact of their being in the possession of his attorney. But how far the executor of an attorney could insist on the objection now made by the defendant Clavering, was a question which the present circumstances did not require to be decided; because Clavering had himself submitted to produce the papers admitted to be in his possession, if the court should so direct. The objection therefore was substantially, not Clavering's, but Reed's. The bill was for relief, not for discovery only; and therefore the long pendency of the suit did not press so strongly upon the judgment of the court as it would have done, if it had been a mere bill of discovery. Generally speaking, and *prima facie*, it was certainly not necessary to make an attorney a party to a bill seeking a discovery and the production of title deeds, merely because he has them in his custody; because the possession of the attorney is the possession of the client [S. L. *Furlong v. Howard*, 2 Sch. & Lef. 115]; but cases might arise to render such a proceeding advisable, as if the attorney withheld the deeds, and would not deliver them to his client on his applying for them.

Whether executors of attorney entitled to attorney's privilege?

Attorney not a necessary party to a bill of discovery.

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"This was the case of a *vivum vadium* (as it was called, in contradistinction to a *mortuum vadium*), in which no time was limited for redemption, but the party was left to pay himself the sum for which the estate was pledged out of the rents and profits of the premises. The words of the agreement, as stated by the answer, were, 'to yield up and deliver possession of the pre-

Welch mortgages, their nature and use.

his heirs or assigns, should pay the same with interest within eighteen months after such request; and W. was in like manner let into possession of the last-mentioned premises: a bill for redemption brought, after a period of one hundred years were elapsed, was dismissed, and that decree for dismissal affirmed in the House of Lords.

The ground of which decree, as to the premises first mortgaged, appears to have been, that the comprising them in the latter mortgage put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption by demanding the mortgage money, *which demand was admitted to have been made by W.*

Any act by mortgagee acknowledging mortgage, keeps alive equity of redemption; as a devise, or bill to foreclose.

Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule (y); as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose,

(y) *Orde v. Smith*, Sel. Ch. Ca. 9. supra, 365 a. Vide 2 Ves. jun. 84. 3 Ves. 22.

When debt is paid, time begins to run.

mises to Rooke, to hold as his freehold, until, &c.' This did not contradict, but rather appeared to strengthen, the idea that the meaning of the transaction was only to enable the party to pay himself out of the rents and profits of the estate. These words, 'as his freehold,' were employed by Lord Coke in describing the estate by *elegit—ut liberum tenementum*, because *nullum simile est idem*. Co. Litt. 43 b. The agreement was, that Rooke should hold precisely in this manner; and if the case rested on the agreement with Rooke, it was clearly settled that *length of time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt was fully paid and satisfied*. That length of time might, under such circumstances, be set up as a bar in the case of a Welch mortgage, as in an ordinary mortgage, had also been determined: and if the assignment to Reed was only till Rooke's debt should have been paid, it was impossible to say that the bar might not be set up in the present case; and in a future stage of this cause, it might be just to determine accordingly. But on this point the answer left it doubtful, not only, whether Reed took possession under an agreement to pay himself his own debt in addition to Rooke's; but, if he did so, whether the amount of both debts had even yet been satisfied by perception of the rents and profits. Then, if this were not a case in which length of time alone would operate as a bar to redemption, the question might still remain, whether there were circumstances to raise the *presumption of a release* insisted on by the defendant?

Presumption of release from

"The weight of long continuance of possession, as a ground for such redemption, would depend most materially on the nature of that possession; and here, again,

or even by the mortgagee keeping accounts upon it(x). So a man taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after twenty years.

But a mere conversation, by which a person, once a mortgagee, but to whom a subsequent conveyance was made, importing a title, might otherwise have been inferred to have admitted he held by mortgage, was, on an appeal from a decree of the Master of the Rolls, deemed by the Chancellor not to be a case within the exception. On the appeal to which I have last alluded, the facts appeared to be, that a surrender was made by P. to M., the re-conveyance to be to such uses

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Conversational admissions of subsistence of mortgage, proved by parol, not enough to continue redemption.

(2) 3 Ves. 22.

there was no certainty in the case, as it then stood, whether the possession by Reed, after Rooke's debt was paid, was originally an *adverse* possession, or whether, at first, holding by virtue of a distinct agreement with A. B., his possession became adverse at some period subsequent to his entering under that agreement. In the latter case it would be much more difficult to raise the presumption contended for. These were undoubtedly points fit for further inquiry. And in the present stage of the cause, Lord Eldon felt no doubt, that an attorney, submitting to produce the title deeds of his client in his possession, as the court should direct, might be called upon to produce them if the principal could himself have been called upon to do so. And his Lordship made an order (1 Meriv. 723), that the defendant Clavering should produce and leave with his clerk in court all drafts and copies of deeds, letters, and papers, relating to the transactions in question. The further stages of this cause are reported in 5 Barn. & Ald. 232, and 6 Madd. 7. et vide infra, vol. ii. 1155. also *Cooke v. Soltan*, 2 Sim. & Stu. 154. et infra, 400, 509.

length of possession, depends on nature of possession, whether adverse or not.

Discovery granted.

On this case it is observable, that a learned cotemporary writer has produced an extract from a manuscript note of this judgment of Lord Eldon, whereby his Lordship is made to say, "*I think holding over twenty years after the debt is paid may amount to saying, that you are barred, on the same principle as if it were a mortgage of an ordinary nature,*" 1 Madd. Ch. 519, 2d edit.; and the same writer observes, in n. (x), that he is not aware of any case where the point has been so determined, except in that case.—The rule is reasonable. It is a case directly within the statute, the equitable application of which we are now considering. After the rents have satisfied the debt, the estate of the mortgagee is extinguished, and the mortgagor might maintain ejectment, *per* Lord Hardwicke, 2 Atk. 362. This shews that a right commences in the mortgagor at a specific time, which, if he neglects to prosecute, the statute will destroy. There can be no doubt of the necessity and existence of the doctrine as quoted above, *in italics*, from Mr. Merivale's report of the judgment of Lord Eldon, in *Fenwick v. Reed*, *ubi supra*.

Mr. Maddock's doubts removed.

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as P. should direct, or to himself in fee (a). There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to M. in fee, subject to the trusts of the former conveyance. Under these conveyances P. enjoyed the estate, without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, M. took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to shew under what title M. held. In 1776 a bill was filed to redeem. In the first answer put in 1780, M. denied that he held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that M. held only as a mortgagee. It was a conversation between the son of P. and M., in which M. asked the son, *why his father did not pay the money; to which he answered, because he was so poor he could not pay it. The reply of M. to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed, and the cause was heard at the Rolls; and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellor, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage; as otherwise the mortgagee would have got the equity of redemption for nothing, and the P.'s would have estates for life, subject to the mortgage money, which was more than they were worth: the words, "subject to the trusts" must therefore mean, "subject to the life estates" of the mortgagor and his wife. Then if it was considered as matter of title, the rule did not apply. If M. had been the surrenderer (which he ought to have been) it could not have been, that a conversation should defeat a clear act. Then there was evidence of a clear possession in P. and his wife. After her death the M.'s took the estate, and treated it as their own. On the whole, the

(a) *Perry v. Marston*, 2 Bro. C. C. 397.

Chancellor was of opinion, that the surrender was an instrument of title; and the decree was reversed (H).

(H) This case is taken from a very inaccurate report of Mr. Brown, 2 Bro. C. C. 397. It stands as an authority, that parol evidence of verbal admissions by a person (who was once a mortgagee), that he had no other title, or that he still remains in his character of mortgagee, will be sufficient to give continuance to the redemption for a period of twenty years, commencing from the time such admissions are made. The facts are imperfectly disclosed, and the case was decided on another point. It appears from a statement of this case in 2 Cox's Ch. Rep. 295, that the propriety of admitting parol evidence in cases of redemption, did not form any part of the Chancellor's decision. According to that account, Lord Thurlow's judgment turned entirely on the operation of a particular surrender, whether it was absolute or conditional. His Lordship thought it was an absolute surrender, and consequently an extinguishment of the mortgage. *Case in text badly reported.*

In the three late cases of *Whiting v. White*, Coop. Rep. 1. S. C. 2 Cox's Ch. Ca. 290. *Reeks v. Postlethwaite*, Coop. Rep. 161, and *Barron v. Martin*, ib. 192, this subject was considerably discussed. In several preceding cases the point has been dubiously hinted at, especially by Lord Rosslyn in *Lake v. Thomas*, 3 Ves. 21, but in none of them did it receive a final determination. In *Whiting v. White*, (ubi supra) Lord Alvanley, M. R. reprobated the introduction of the rule, saying he could not help thinking, that it would have been a very wise provision if no parol evidence had been admitted on these subjects. It was clear that a party might obtain an irredeemable interest by twenty years possession, and then that interest was liable to be totally changed by this sort of loose conversation. He would not lay it down in that case, that no parol evidence should ever be admitted, because the case did not call for that decision, though he would be glad to find it so ruled. But this much he would say, that if such evidence be admitted, it ought to be *clear, unequivocal, and to shew a deliberate intention of giving a redemption*. His Lordship thought that the case of *Perry v. Marston* was in itself strong evidence of the wisdom of the statute of Frauds; and indeed the conflicting testimony in that case seems fully to substantiate the noble Lord's remark. *Reference to late cases.*

Parol evidence, if admitted, should be clear.

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In *Reeks v. Postlethwaite* (ubi supra) the judgment of the Vice Chancellor (Sir Thomas Plumer) is highly illustrative of the point in question, and indeed of the subject in general. In that case, a bill was filed for redemption of a mortgage after twenty years had elapsed, on the evidence of a conversation between the attorney of the mortgagor and the mortgagee and his wife, which conversation was proved by one witness only. The expressions used by the mortgagee, consisted of a train of ironical observations, advising the mortgagor, if he had any right to call a court, and take up the estate. The whole evidence was equivocal, and the bill was dismissed. His Honor, however, in the absence of an express decision, was, on principle, of opinion that parol evidence was admissible in such cases, to prove an acknowledgment of the existence of the mortgage by the mortgagee. The leading features of his judgment were to the following effect:— *Vice Chancellor's judgment in Reeks v. Postlethwaite.*

“The right to redeem arises upon the original contract between the parties, being by the very terms and upon the face of the conveyance itself. It is *Rule as to length of time*

Mortgagee gave mortgagor liberty to redeem after twenty-

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a pro-

being a bar to redemption, examined with a view to admission of parol evidence.

true, that when the time specified is elapsed, that right is gone at law, but not in equity. That gets rid entirely of the objection of the statute of Frauds, for the contract was in writing, and the right of redemption was reserved by that contract. With reference to the rule as to twenty years being a bar to the right of redemption, the first question is, is it an absolute rule? No; it is a qualified rule, depending altogether on circumstances. Numberless cases might be cited as to that, first, where there have been disabilities of the party, as infancy, coverture, beyond sea, &c. Now writing is not necessary to prove these disabilities, and it would often be impossible to procure it; parol evidence of them is always received. Next, are disabilities the only cases in which the rule is departed from? No; *receiving interest, keeping accounts, treating it in any will or deed, as a mortgage, and other acts of that sort, are sufficient to take the case out of the rule.* These acts may be solemn and deliberate or not, according as the party is attending, or not attending, to what is doing. To acknowledge that it was originally a mortgage, is nothing at all; that is, *ex concessis*, and conversation, therefore, admitting that fact, cannot carry it farther than the original deed between the parties carried it. There must be evidence that it is a subsisting mortgage. With respect to every one of the acts in all the cases in which a redemption has been decreed after twenty years, it may be asked how they are to be proved? By the law of evidence must be the answer. By writing only? Where is the law that says that? What precise act then, will be sufficient? The answer must be, any precise act. So, with respect to the statute of Limitations, it might be shewn, that after twenty years, an actual entry was made, or that the party acknowledged the subsistence of his tenancy. So, with a mortgagee, the acts need not be done with the other party; his own acts, the mere *ex parte* acts of the mortgagee will be sufficient. Cases of part performance constitute another class of cases in which parol evidence is received respecting interest in land. So cases of trust. If you tie a party down to written evidence, great injustice would often happen.

Parol evidence admissible to prove right of redemption in mortgagor.

“ On the other hand, *Perry v. Marston* is certainly a case shewing the danger of setting up parol evidence. But we must take care of the principle. To say there is a danger of perjury amounts to little; because there is danger of perjury in all parol evidence, and the objection therefore would go to do away with it entirely. An acknowledgment of a debt of a 100,000*l.* rights of way, easements, watercourses, and numberless other cases, all of them often of immense value, depend upon this sort of evidence. All the court can do, is to watch and take care of it, when competent in its nature. Look to the danger the other way, that is, that if you were to say, that after twenty years there shall be no parol evidence for a redemption; a mortgagee may have amused his mortgagor with promises of settling every day; suppose, even interest to have been paid, but which was only to be proved by parol, how easy would it be in such cases, and many others which might be put, for the mortgagee to draw on the mortgagor till twenty years have elapsed, and then to hold him at defiance? It seems therefore, reasoning *a priori*, impossible to say

mise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed (*b*); because, though forty-one years had passed since

(*b*) *White v. Pigeon*, Tothill, 232.

seven years had elapsed. Redemption allowed fourteen years after, though forty-one had passed since mortgage.

that parol evidence is, upon principle, inadmissible to found a right to redeem after twenty years, but at the same time it must depend on the nature and circumstances of each particular case; and the facts must be tried in this, as in all other cases, by the rules of evidence. Sir Thomas Plumer concluded by observing, that he had sifted the case to the bottom, from respect to what was said by Lord Alvanley and Lord Rosslyn on the subject, but there being no case rejecting parol evidence, he thought it must be received.

"Then, how far the testimony in the case before the court (*Reeks v. Postlethwaite*), was sufficient to prove an acknowledgment of the mortgage by the mortgagee, was the next question for consideration. A conversation between the attorney of the mortgagor, and the mortgagee and his wife, there being nobody to contradict him, must be looked to with considerable caution. The conversation happened in the midst of the defendant's harvest, when the witness demanded the mortgage account; the defendant's answer was material, because it postponed the discussion of the subject; his afterwards saying, that he wanted nothing but what was fair, was admitting nothing at all, but leaving the question as to what was fair, perfectly undecided. The advice given by the mortgagee to the mortgagor to call a court, and take up his estate, was mere taunting and irony. The mortgagee had sworn in his answer, that that was the sense in which he used the expressions imputed to him. This answer was opposed by the evidence of one witness only. To decree a redemption, when an ignorant man had been taken advantage of, without a single witness to explain or contradict a conversation set up, would lead to excessive danger. In *Perry v. Marston*, there were several witnesses examined, and their evidence proved a clear and unequivocal acknowledgment that the mortgagee had accounts ready. But in the case before the court, there was nothing like an acknowledgment, treating the mortgagee as a subsisting incumbrance, within twenty years." On these grounds, therefore, Sir Thomas Plumer dismissed the bill, but without costs.

Conversation between mortgagor's attorney and mortgagee, looked to with caution.

Shortly after this decision, the case of *Barron v. Martin* (*ubi supra*) involving the same question, came on before Sir W. Grant, in which he said he agreed with the Master of the Rolls in *Whiting v. White*, and with the Vice Chancellor in *Reeks v. Postlethwaite*. The case of *Barron v. Martin* has been previously noticed, ante, 373, n. (D), and therefore its further introduction here would be superfluous.

Reference to *Barron v. Martin*.

The rule to be collected from these cases is, that clear and unequivocal parol evidence of oral admissions and acknowledgments by the mortgagee, shewing a continued and deliberate intention to give a redemption, will be admitted to prove an equity subsisting in the mortgagor and his representatives, if twenty years have not elapsed since their utterance. The principle mentioned in page 386, post, that time will be no bar where the mortgagee submits to be redeemed, may be considered as the basis of this rule.

Modern rule as to admission of parol evidence.

the mortgage, yet but fourteen had elapsed after the time agreed for redemption.

Redemption allowed after forty years, on admission by mortgagee within seven years of filing bill, [385] that mortgagor had a right to redeem.

So, a mortgage was decreed to be redeemed upon the foot of an account stated previous to the mortgagee's entering upon the premises, notwithstanding he had been in possession forty years (c); the husband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about seven years before the bill for redemption came to a hearing, for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the court refused to decree a specific performance of that agreement, yet it seems to have been considered, as an admission by the mortgagee, that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that immediately preceding.

Redemption allowed after fifty-five years, thirty-eight having been spent in litigation, and seventeen only without claim.

Upon the same principle a redemption was decreed upon a bill filed fifty-five years after the original mortgage, and forty-seven years after the mortgagee got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusal by four different answers to come to an account upon the foot of the mortgage, and to redeem (d). For the non-redemption for thirty-eight years of the time elapsed being accounted for, by having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute, and the exhibiting a bill to redeem (1).

(c) *Conway v. Shrimpton*, 1 Bro. 19.—Ed.]
 Parl. Ca. 309. 2 Eq. Ca. Abr. 596, (d) *Palmer et al. v. Jackson et al.*
 pl. 10. 739, pl. 2. [Et vide *Grounds* 5 Bro. Parl. Ca. 194.
 and *Rudiments of Law and Equity*,

What will bar an ejectment will bar bill in equity.

(1) The late cases on this subject, and those which have not been antecedently noticed, as well as a recapitulation of the leading rules on this head of the chapter, may with propriety be introduced in this place. In *Cook v. Arnham*, 3 P. Wms. 287, the rule was put on this footing, that where length of time will not bar the right to bring an ejectment, there it shall not bar the right to file a bill in equity. There is no objection to the rule as it so stands. Sir Joseph Jekyll stated it nearly in the same terms in *Floyer v. Lavington*,

And if the mortgagee *submit* to be redeemed, time will be no bar.

Mortgagee submitting to redemption, time no bar.

1 P. Wms. 270, and in that shape it was approved by Lord Redesdale in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637, who said that every new right of action in equity, whatever it might be, must be acted upon at the utmost within twenty years after it accrues.

And here by the way, note, that when the equity of redemption is barred by length of time, the mortgagor is also barred of all writs of right, and other remedies by real action, the mortgagee becoming as against him and his heirs, absolutely and indefeasibly seised of the estate for the term or interest granted; but a second mortgagee, who advances his money without notice of the first, will not, it seems, be affected with the mortgagor's non-possession, that is, if the mortgagor be out of possession twenty years, and the second mortgagee receive interest on his security during any portion of that period, then, though the first mortgagee may have been in possession for twenty years, it will not destroy the right of the second mortgagee to redeem, though it will the right of the mortgagor. See post, 528, 9, in the text.

Mortgagor barred of writ of right;

but second mortgagee not affected.

In an *Anonymous case* in Atkyns, vol. iii. 313, it was argued, on the part of the mortgagee, that whoever came for a redemption, must shew a *disability* in the owner of the equity of redemption to come sooner, and that if the court should be satisfied in this respect, yet, it would not decree a redemption, where it would subject the mortgagee to great inconvenience in taking the account. Lord Hardwicke however said, he knew of no such rules, and observed, that whenever the court decreed a redemption, it provided as well as it could against laying the mortgagee under inconvenience in passing his account.

Objections that mortgagor did not come sooner, and that accounts are perplexed, no avail.

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But although it be not necessary for a mortgagor, applying to redeem within twenty years, to shew impediments which prevented him from coming sooner, yet if there are *gross laches* (*Harmood v. Oglander*, 6 Ves. 199), or if there has been that delay or forbearance that makes it, not illegal, but *inequitable* to demand payment, a court of equity will tell the plaintiff, that the law to which he is entitled, is not that, which is administered in equity, and will leave him to his remedy by an action at law. *Foster v. Hodgson*, 19 Ves. 185.

Mortgagor sent to law, if his case inequitable.

As to the acknowledgment of the mortgage by means of recitals, or other acts *in pais*; Lord Redesdale observed, in *Carew v. Johnston*, 2 Sch. & Lef. 295, that it was every day's practice to conclude a mortgagee by *recitals* in his *own deeds* (vide 2 Bro. C. C. 399). Estates were often made redeemable by such recitals, where otherwise they would not be so. And his Lordship said he remembered a case, where the evidence to make a mortgage redeemable, which otherwise would not have been so, on account of length of time since the mortgagee had obtained possession, was a deed, reciting that a specific sum was due which greatly exceeded the value of the land, and therefore conveyed the estate absolutely; and it was contended, that notwithstanding the terms of the deed, the parties entitled to the redemption, should be at liberty to shew a less sum due than was recited in the deed. But Lord Kenyon said "No; if you use this deed to shew the property redeemable, you must take the acknowledgment altogether as it stands."

Recitals in deeds between mortgagor and mortgagee, keep alive redemption.

In corroboration of those remarks, Sir W. Grant decided (against the heir of the mortgagee, and a purchaser with notice), that redemption should

So do recitals between third

Thus, where a bill was brought to redeem after the mort-

be decreed after the lapse of twenty years, if within that period, any acknowledgment of the mortgage by the mortgagee, or those claiming under him, had been made, not only in transactions between the mortgagor and mortgagee, but also in transactions between third persons, to which the mortgagor and his heirs were not parties. *Hansard v. Hardy*, 18 Ves. 455. *Hardy v. Reeves*, 4 Ves. 466. 5 Ves. 426, cited 3 Madd. Rep. 188, n. (a).

Redemption decreed after thirty-four years possession by mortgagee, on recitals in deeds, between him and third persons.

Sir W. Grant's judgment in this case, is so forcibly apposite to a due consideration of the point in question, that a detailed statement of it here, will not require the introduction of an apology. The leading features of the case were shortly these:—In 1802, a suit was instituted by the heirs of the original mortgagor for a redemption, insisting upon the acts of the mortgagee, by certain deeds of 1773 and 1786, treating the estate as redeemable. The defendant contended, that since there was no trace of any account, no communication, receipt of interest, no transaction whatever with the mortgagor, no circumstance to shew that the mortgage was existing, except a settlement in 1773, on the marriage of the residuary legatee of the mortgagee, and a deed in 1786, in which it was averred, that the estate in question was treated as a mortgaged estate; and since no step had been taken until this bill was filed in 1802, after a period of *thirty-four years*, from 1768, when a decree in the cause declared the interest to be redeemable, it was then too late to come for a redemption. The Master of the Rolls:—"Although I thought there was very little room for doubt upon this question, I wished to have an opportunity of inspecting the different deeds. The bill was filed for the redemption of a mortgage made in 1732. The defendants allege, that the redemption is barred by the length of time. It is admitted, that the mortgagee has been in possession for more than twenty years before the bill filed. There is no evidence of any interest paid, or of accounts rendered or kept by the mortgagee within that period; but the plaintiffs allege, that within that period the mortgagee has treated it as a subsisting mortgage, and therefore cannot contend that it has become irredeemable. It is admitted on all sides, that the mortgage must be taken to have been redeemable in 1768, the time of Robert Fryar's death. Then the plaintiffs say, that by deeds executed in 1773, and in 1786, the mortgagee treated it as a subsisting mortgage, and that within twenty years after the latter period; viz. in 1802, the bill for a redemption was filed, and therefore the plaintiffs come in sufficient time. Those deeds certainly do, in the plainest and most explicit terms, treat this as a mortgage interest. It is the money due upon the mortgage that is the subject of the settlement, made by the first of them, and of the security, created by the second; the mortgaged premises are assigned by each, but it is the money due thereon that is the direct subject of both. It is however said for the defendants, that these acknowledgments made in dealings with third parties, are totally foreign to the mortgagor; and that the acknowledgment, which is to operate so as to bar the objection from length of time, should be an acknowledgment arising out of some transaction directly between the mortgagor and mortgagee. How far that would be the more reasonable rule, I shall not now examine: but certainly it is *not the established one*. Upon the established doctrine of the court, therefore, the recognition of the deed of 1786, of *this*, as a subsisting

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Objections that recitals should be in deeds between mortgagor and mortgagee, overruled.

gagee had been in possession from 1707 to 1732, the year in

mortgage, is sufficient to prevent the mortgagee from now setting up the length of time against the right of redemption;" and therefore his Honor made the decree above-mentioned.

In a more recent instance, it appeared that A. made a mortgage for years to B. and then settled the equity of redemption on his daughter and her husband and their heirs, who in the year 1774 joined in conveying the premises to one Stephen in fee, but without fine. Stephen sold the premises to Copner in August 1796, and in the conveyance *recited* that he had discharged the mortgage to B. The conveyance to Stephen not being by fine, a right of redemption remained outstanding in the daughter, who survived her husband, and died in 1803. The plaintiff was her heir at law, and filed his bill for redemption against Copner in January 1816; which was decreed, on the ground that the *recital* in the conveyance to him was an acknowledgment of the mortgage title within twenty years before the filing of the bill. *Price v. Copner*, 1 Sim. & Stu. 347.

And here note, that the statute may operate as an equitable bar, notwithstanding the existence of an outstanding legal estate. Thus, in *Davie v. Beardsham*, 1 Ch. Ca. 39. S. C. Nel. 76, where the legal estate of a copyhold was, and continued to be, outstanding in a trustee, the owner of the equitable estate, who had acquiesced for twenty years in the adverse possession of the person to whom the estate was, by mistake, supposed to belong, was held to be barred in equity, by analogy to the statute, and his bill for relief was on that ground dismissed, though it was clear he would have been entitled to it, had the suit been instituted before the twenty years had expired. Et vide *Cholmondeley v. Clinton*, *infra*, vol. ii. 1149.

Analogy to statute may operate, although legal estate outstanding.

When a person, through ignorance of his right, neglects to claim within the limited time, the rule, in a general point of view, is not on that account less applicable or less hostile to his demands. And it being a mere arbitrary positive rule, and a fixed period being ascertained, it would not be sound discretion in the courts, from circumstances of *distress or embarrassment*, to give relief beyond the time prescribed. Indeed, if the parties sleep so long on their rights (observed Lord Redesdale in *Hovenden v. Annesley*, *ubi supra*), as to give cause for the application of the rule, it is but reasonable they should suffer the consequence of their laches, and though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, are persons embarrassed and reduced by the fraud of others, yet the court cannot act upon such circumstances. If it did, there would be an end to all limitation of actions in cases of distressed persons; for if relief might be given after twenty years, on the ground of such distress, so might it after thirty, forty, or fifty; there would be no limitation whatever, and all property would be thrown into confusion. Et vide p. 442, n. (N), *infra*.

Ignorance of rights or distress of parties no bar to rule.

Circumstances of *embarrassment* and *ignorance* of right, are still however looked upon, as affording some palliation for not endeavouring, on the one hand, to avert what the party could not have prevented, and for not prosecuting, on the other, a claim which the party was not aware of.

But they are circumstances affording some palliation.

In the late case of *Chalmer v. Bradley*, (*ubi supra*) page 361, 2, 3, *in natis*, the plaintiffs stated, that they were ignorant of the facts. It was possible,

which the bill was filed (*e*), and the defendant (it being a family

(*e*) *Procter v. Oates*, 2 Atk. 140.

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said Sir Thomas Plumer, they might be so. But was there not any thing that might lead them to that knowledge?—Nothing appearing on the case, his Honor directed an inquiry, whether the plaintiffs had any notice of these circumstances, implied or otherwise; observing, that the reason why he directed this inquiry was, that though he was impressed with the impolicy of permitting stale demands to be brought forward, though he knew that on the principles stated in *Smith v. Clay*, Amb. 645. 3 Bro. C. C. 639, n. (†), a court of equity was not to be called into action by those who were not vigilant in support of their rights, and was aware of the monstrous inconveniences that would result, if, at some period, the door was not shut to litigation; yet he fell in entirely with the opinion expressed by Lord Alvanley in *Pickering v. Stamford*, 2 Ves. jun. 272. There the suit was commenced after a lapse of thirty-five years, by persons who declared themselves to have been ignorant of their rights. Lord Alvanley, under the circumstances of that case, could not be sure that they were not ignorant, and therefore stating strongly his opinion in favor of the general principle, that a party ought to be barred by length of time, and lamenting that he could not in that instance follow it, he directed similar inquiries, stating at the same time, that if he (Lord Alvanley) were then to decide the case before him, he would decide it against the plaintiffs, and that by the inquiries he did not decide one way or the other, and would afterwards consider whether there was sufficient equity in the bill or not.—It was therefore, because there was not before him any direct and positive evidence that totally excluded all doubt upon it, that Sir Thomas Plumer directed the inquiries in *Chalmer v. Bradley*, to obtain some light on the circumstances under which the undisputed enjoyment of the property had gone, reserving to himself to judge what should be the effect of the facts which might be found by the Master, or what, even without that result, he might think right to be done. Vide etiam, vol. ii. p. 1153.

Reference to
Cholmondeley
v. Clinton, as
abridged, *infra*,
vol. ii. p. 1149.

In the great case of *Cholmondeley v. Clinton*, recently decided, and which may be fairly called the *Magna Charta* of this branch of the law, the mortgagor and his heir, had been in possession of the estates in question for upwards of twenty years, regularly paying, in the mean time, interest to the mortgagee. The mortgage being in fee, the mortgagor had merely an equity of redemption. After twenty years had expired, a claimant preferred a bill in equity, alleging, that under the sound interpretation of a will (which was the foundation of the said mortgagor's title), he was the true owner of the estates in mortgage. To this claim the twenty years possession was opposed, but it was objected, that the statute could form no impediment in this case to the title of the claimant, since there was no adverse seisin, the twenty years possession being of a mere equity of which no seisin could be had. It is sufficient to state here, that this argument did not, in the end, prevail, though, from the way in which it was supported, much weight was given to it by the opinions of four of the Judges before whom the case was successively argued; and the point was not finally determined until it reached

affair) submitted by his answer to be redeemed notwithstanding

the House of Lords. The case is reported in its various stages by Vesey, Cooper, Merivale, Barnewell & Alderson, Jacob & Walker, Sugden & Turner, and occupies in the whole upwards of 500 pages. It contains several points on the law of mortgages, which cannot therefore well be developed without some narration of the facts. The Editor has added an abridgment of this voluminous case in the Second Volume, page 1149, so far as it respects the subject-matter of this Treatise, which he conceives will not be unacceptable to the practical lawyer, whose time cannot be very profitably devoted to the tedious perusal of such a ponderous mass of matter, merely for the detection of a single point. To this abridgment reference is made, where also a few latter determinations are noticed.

It should seem, that an estate may be redeemable as to one part, and irredeemable as to another part, through the effect of length of time, although the whole may have been originally comprised in one mortgage. This rule, if it can be established, has no tendency to encroach on the well-settled axiom, that the redemption of the mortgage must be entire or not at all. This latter rule applies only, where a person has two recent mortgages on distinct estates, and the right to redemption is not in dispute. But where a person has two mortgages, one of which has been abandoned for more than twenty years, and the other has been acknowledged by the mortgagee to be an existing charge within that period, it seems impossible to contend, that such admission by the mortgagee as to one mortgage, shall revive the redemption as to the other. But it is more difficult to suggest any well-founded argument against the resuscitation of the whole mortgage, if the mortgagee, on an assignment of part of the premises to a third person, states, that he so assigns them, subject to all liability of redemption which resides in the original mortgagor. Lord King was clearly of opinion in *Rakestraw v. Brewer*, Mose. 189, that if the mortgagor were in possession of any part, he should be admitted to redeem the whole; for part he might redeem, as being in possession thereof, and part he could not, separately from the whole. And it might be argued, that an acknowledgment of the existence of the mortgage as to part of the premises, would be equivalent, for the purposes of redemption, to a retention of possession as to that part; and therefore, since he might redeem part, he should be admitted to a redemption of the whole, because a mortgage is not to be redeemed by piece-meal, but entirely, or not at all. But the case in contemplation is this:—Suppose the mortgagee to have been in possession twenty years, and by his will to have devised one part of the mortgaged estate to A. and another part to B.; if A. acknowledge the mortgage in any way, the question occurs—how will that affect B.? Lord Eldon has said, in *Lake v. Thomas*, 5 Ves. 22, that he recollected a long case before Sir Thomas Clarke, (was it that of *Lutterell v. Love*, ante, p. 370?) in which a mortgaged estate had come into the hands of two different families, and redemption was refused as to part, from length of time, and opened as to other part, on the ground that mortgage accounts had been kept by the owners of that part; and there was also, it appeared, a devise of it as a mortgage. This may be considered as deciding the hypothecated case

Mortgage may be redeemable as to one part, but not as to another, at same time.

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the length of time, Lord Hardwicke, though he said he saw

in favor of B. and as establishing the rule to a certain extent, that an estate may, at one and the same period, be redeemable as to one part, and irredeemable as to the other part, from length of time.

Qualification to last position. Redemption of part.

Since the last edition of this work, two other cases have been decided in Ireland on this question, but they do not materially affect the doctrine as above stated. In the *first*, a redemption was decreed where a mortgagee had been eighty years in possession of *part* of the mortgaged premises—the mortgagor continuing in possession of the remainder. Lord Manners, C. in the course of his judgment observed, that in the absence of all authority on the subject, except the case of *Rakestraw v. Brewer*, Sel. Ca. Ch. 55, he should say, that the right of possession was not barred unless there had been for twenty years an uninterrupted adverse possession of the *entirety* of the mortgaged premises; for although the mortgagor might be in possession of *part*, yet he had no legal title to it, the legal title was in the mortgagee, and his, the mortgagor's, possession, was under the mortgage title; it kept that title open, and he could not get the legal title back, except by filing a bill to redeem, and then there would be a decree for redemption as to one part, while it would be denied as to the other; which, where the plaintiff succeeded by force of his own title, and not on any submission by the defendant, seemed very inconsistent; and indeed, not to decree a redemption, where the mortgagor had remained in possession of part of the premises, would be directly contrary to the opinion of Lord King, in *Rakestraw v. Brewer*. But the transaction in the case before Lord Manners was explained by the answer of the defendant, who stated, that by the consent of the mortgagor he went into possession of the premises, for the purpose of *keeping down the interest*, and of paying off the debt. It was therefore quite manifest that the possession had not been adverse; for it not only originated in the consent of the mortgagor, but had, within these twenty years, been so acknowledged by the mortgagee, and *that* not only of a part, but of the entirety of the premises. *Burke v. Lynch*, 2 Ball & Bea. 426.

In the *second* case it was held by the same noble Lord, that where a mortgagor has been permitted to continue in possession of *part* of the mortgaged premises, he is entitled to a redemption of the entirety, although the mortgagee may have been upwards of twenty years in possession of the remainder; but where by sale of part of the premises, the mortgage has been paid off, and the remainder reconveyed to the mortgagor, he will not, after twenty years, be entitled to redeem the purchaser; the mortgagor's title to that part of the premises in his possession not being derived from the mortgage. *Blake v. Foster*, 2 Ball & Bea. 565. 387.

No time a bar to redemption of rent charge. (Sed qu.)

It is further observable, that the reason of the rule under consideration, and consequently the rule itself, is inapplicable to the case of a rent-charge. One objection to redemption, after the lapse of a great length of time, arises from the difficulty it lays the mortgagee under in accounting. Now *this*, in the case of a rent-charge, cannot exist. A distinction of this kind was taken in the case of *Lord Widdrington v. Jennings*, in Lord Harcourt's time, cited by Sir Joseph Jekyll in *Floyer v. Loxington*, 1 P. Wms. 270, et vide S. P. ante,

no colour for the redemption, yet, on the defendant's submis-

133, where the court took a difference between a mortgage of a rent-charge, and of land, and allowed a redemption in the former case after a lapse of eighty years.

To recapitulate the principal points adduced under the present division of the chapter, and to commence with the statement of a general rule, we cannot do better than refer to the outline of the doctrine sketched by Sir R. P. Arden, M. R. in the case of *Whiting v. White*, 2 Cox, 293. "The possession," he is there made to observe, "must be such as shews that the mortgagee held it as his own estate. If, therefore, any interest has been received, or if an account has been settled between the mortgagor and mortgagee of what is due upon the mortgage, whereby it appears, that the mortgagee considers himself as having only a *redeemable* interest, or if by any solemn act of the mortgagee, such as a *will* or *settlement* made by the mortgagee, it appears that he considers the estate redeemable, it shall, as against him and all claiming under him, be held to be so, and the time will only run from the date of such acknowledgment.—But this is to be understood only in cases where there is no fraud or improper covenants, whereby the mortgagor may be prevented from redeeming."

Epitome of points adduced in this division of chapter.

In addition, we may observe, that the acknowledgment of the mortgage as a redeemable interest in a *letter to a friend*, *Fenwick v. Reed*, 6 Madd. 8. (such letter proving itself, *ib.*) or in a *settlement between third parties*, (2 Cox's Ch. Ca. 294), or in a *surrender*, to which neither the mortgagor nor his heirs are parties (*Hansard v. Hardy*, 18 Ves. 455), or by means of an *assignment*, wherein the estate is treated as subject to redemption (*Smart v. Hunt*, 4 Ves. 478, n. a.) these, and other deliberate acts of a similar nature, will be sufficient to keep alive the equity of the mortgagor and his heirs, to the redemption of the estate. So, an *answer* in Chancery (*Procter v. Oates*, 2 Atk. 140), a *recital* in a deed (*Carew v. Johnstone*, 2 Sch. & Lef. 295), a *devise* in these words, "all my mortgaged estate," or in words of like import (*Anon.* 3 Atk. 314), the *demand* as distinguished from the *receipt* of interest (*Trash v. White*, 3 Bro. C. C. 289), and an *account* kept (*Vernon v. Bethell*, 2 Eden Rep. 114), stated (*ante*, 370), settled (*Anon.* 2 Atk. 533), or promised (*ante*, 370, n. (B)), will have the same effect; for the rule proceeds on the motion of a dereliction of the pledge; and the difficulty of making up accounts after a great length of time, cannot apply to cases where the party in possession of the pledge continues to treat it as subject to redemption; but the *mere demand* of an *account*, without process or acknowledgment (*Hodde v. Healy*, 1 Ves. & Bea. 540), or an account stated without the authority of the mortgagee (*Baron v. Martin*, Coop. Rep. 192), or a *devise* in the words above-mentioned, after a foreclosure or a conveyance of the equity of redemption (*Silberschildt v. Schiott*, 3 Ves. & Bea. 45), will not take the case out of the principles adopted by courts of equity in analogy to the statute; and where it so happens that the person to pay the interest on the mortgage, is the same person who is to receive it, as if a tenant for life of the equity of redemption has conveyed his life estate to the mortgagee, *there*, the presumption will not arise, and although twenty years elapse, the mortgage will be redeemable; *Corbett v.*

Acknowledgment of mortgage in letter, settlement, assignment, surrender, recital, answer, devise, by demand of interest, or promise of account.

six months after the Master's report, or, in default, the bill to be dismissed without costs (*ee*).

Mortgagee offering redemption after release of equity, mortgage revived.

(*ee*) [In like manner, if the mortgagee submit to be redeemed after a conveyance of the equity of redemption, it will revive the mortgage. Thus in *Seymour v. Tindell*, Finch's Rep. 284, the bill was to redeem lands mortgaged to the defendant by the father of the plaintiff; and though the father had released the equity of redemption upon taking up more money of the mortgagee, yet it appearing by letters, papers, and other proofs, that he offered a redemption, and had consented to take his whole principal and interest, the same was decreed accordingly, and an account was directed. But it is worth remembering, that the mere acknowledgment of the mortgage after a release or foreclosure of the equity of redemption, will not of itself and against the consent of the mortgagee resuscitate the mortgage.

On the same principle if a debtor who has become bankrupt, and obtained his certificate, make a promise afterwards to a creditor to pay him at a future day the debt which was due to him before the bankruptcy, he not only revives the debt, and thereby renders himself liable to be sued for its recovery, but he may be held to bail in an action against him, founded on the demand so revived by the subsequent promise; because, as it becomes a good debt recoverable at law, it must have all the incidents of a legal debt, and therefore all the ordinary modes of proceeding to recover it are open to the creditor. *Blackburne v. Ogle*, 8 Price, 526. The promise is not impeachable on the ground of *nudum pactum*—the remedy only being taken away by the bankruptcy, and not the moral obligation to pay. *Ib.* 533.—*Ed.*]

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What will repel this presumption.

satisfaction of a bond had been presumed within a less period, some other evidence had been given in favor of such a presumption, such as having settled an account in the intermediate time without any notice having been taken of such a demand. Et vide 1 Burr. 454. 4 *Ibid.* 1963. The presumption arising after such a lapse of time may be repelled by evidence that the defendant had no means of payment, *Fladeng v. Winter*, 19 Ves. 196; by proof that the original agreement was, that the debt should be paid by instalments when the debtor was able, *Thompson v. Osborne*, 2 Stark. 98, over-ruling *Davis v. Smith*, 4 Esp. Rep. 36; by proof of the defendant's recent admission of the debt; or by proof of the payment of interest within the last twenty years, as by indorsements on the bond, purporting, that interest has been regularly paid, or otherwise (*Searle v. Barrington*, *ubi supra*), this being an acknowledgment that the principal sum was not then discharged, 1 T. R. 270; or the presumption may be answered by proof of other circumstances, explaining satisfactorily why an earlier demand had not been made, as in *Newman v. Newman*, 1 Stark. 101, where the obligee was residing abroad for the last twenty years.—The rule then at law is, that where the bond has been given more than twenty years before the commencement of the action, and no interest has been paid upon it, nor any acknowledgment by the obligor of the existence of the debt during that period, he being, from time to time, competent to pay the same, the bond will, in general, be presumed to be satisfied, *Anon.* 6 Mod. 22. *Anon.* 11 Mod. 2. *Moreland v. Bennett*, 1 Str. 652. *Rex v.*

Time will be no bar if the mortgagor remain in possession (f). As, where a person had chambers in Gray's Inn, So if mortgagor continue in possession.

(f) *Rakestraw v. Brewer*, Sel. Ch. Ca. 55. Mos. 189.

Stephens, 1 Burr. 434. *Forbes v. Wale*, 1 Bla. Rep. 532. 4 Burr. 1963. *Powell v. Godsale*, Finch, 77, though it be still remaining in the hands of the obligee, Wood's Inst. 599; particularly if the debt be large, and the obligor has been all along in good circumstances. *Oswald v. Legh*, ubi supra. But this, it must be recollected, is merely a rule of presumption, and subject to considerable variation from circumstances. And it is observable, that as to an acknowledgment of the debt, one partner may bind his companion by recognizing the existence of the sum due; but, in that case, the acknowledgment must be clear and explicit. *Holme v. Green*, 1 Stark. 458. And when a debtor executes a warrant of attorney to his creditor, to confess judgment for the balance of an account as then stated between them, the warrant of attorney will not alone be a specialty, which takes the case out of the 3d section of the statute of Limitations. *Clarke v. Figes*, 2 Ibid. 231. For further on this head, see *Humphreys v. Humphreys*, 3 P. Wms. 396. *Gratwick v. Simpson*, 2 Atk. 144. *Hillary v. Waller*, 12 Ves. 266. Phillips's Law of Evid. p. 156, 4th edit. and 1 Tidd's Prac. p. 18, 7th edit.

In reference to a dormant mortgage debt, unclaimed by the mortgagee or his representatives for twenty years or upwards, even the analogy of the statute, it has been said, will be inapplicable to such a case, because the mortgagee will be supposed to be continuing in possession from the time the mortgage became absolute; and though courts of equity seldom indulge in fictions, yet it seems they will construe the possession retained by the mortgagor to be the possession of the mortgagee, on the ground, that the mortgagor is a tenant at will to the mortgagee, per Sir W. Fortescue, M. R. in *Leman v. Newham*, 1 Ves. 50. In that case it was argued, that if there be a bond as a collateral security, and twenty years have elapsed without demand of principal or interest, whereby the debt on bond is gone, it were absurd to hold, that the bond should be found satisfied, and the mortgage still due. But Sir W. Fortescue said that would not be the case; for in an action on the bond, if the jury were not convinced that the mortgage money was paid, they would not find the bond satisfied; but if the court were satisfied that the money was paid, they would not suffer the mortgagee to bring an action on the bond. This brought it to the question, whether the money was paid or no; and it was certain, in the case before Sir W. Fortescue, that nothing had ever been paid. If it stood singly on the twenty years elapsed, and no evidence either way, it would be very difficult to determine so large a sum as the present [the amount does not appear on the report] to be satisfied, without putting it in some way to be tried; there was no evidence of its having been paid, and strong evidence that it never had been paid. Whereupon Sir W. Fortescue decreed, that the mortgages were subsisting.—How long the payments of interest had been discontinued, or whether any interest had ever been paid, does not appear by the report, but it is certain that no demand or

Mortgage debt never discharged by length of time merely.

and mortgaged them in 1687, but continued the possession

payment had been made, nor any other notice taken of the debt by the mortgagee or his representatives for upwards of twenty years.

No general rule for presuming mortgage satisfied after twenty years or any other period, elapsing without payment or demand of principal or interest.

One question, in *Toplis v. Baker*, 2 Cox, 122, in the Exchequer, was, whether the plaintiff, who was the mortgagor, was entitled to be relieved against the representatives of the mortgagee, on the ground of the length of time which had elapsed since the last payment of interest on the mortgage in the year 1763. In the year 1754, A. B. became indebted to C. D. on bond, in the sum of 200*l.*, and in 1759 he executed a mortgage of an estate, to which he was entitled in remainder, after the death of one Elizabeth Cripps, to C. D. for securing the sum of 500*l.*, being money lent by C. D. to him; and also executed a bond for that sum, bearing even date with the mortgage. On the 1st November, 1763, interest was paid on the bond for 200*l.*, which was the last sum that appeared to have been paid for interest on either of the debts. In May, 1776, the debt was first demanded of Ann Draper, the administratrix of the mortgagor A. B., which produced a letter from one Mayre, her attorney, who spoke of the debt of 500*l.* as an existing debt, but suggested that the former debt of 200*l.* was included in it. On the 28th February, 1784, Elizabeth Cripps died, when the mortgaged reversion fell into possession. Three years after that a bill was filed, the object of which was, amongst other things, to obtain payment of the debts alleged to be due on the aforesaid bond and mortgage. A cross bill was brought to controvert this; and it prayed that the estate might be declared to be exonerated from the mortgage, and that the bond might be delivered up to be cancelled. It is observable, that no interest had been paid on the mortgage for twenty-eight years, and none on the bond for twenty-four years. The Chief Baron, in delivering the opinion of the court, observed, that the circumstance of no interest having been paid or demanded, created a presumption of payment; but this might be repelled by other circumstances; besides which, it would not be sufficient to dispose of the bond (even if it could be done) without the mortgage. There were circumstances in the case to repel the presumption of payment. Mayre, by his letter, written on behalf of Mrs. Draper, acknowledged the debt, and another circumstance was, that the non-payment of interest was accounted for as forbearance in respect of the mortgaged estate being an unproductive fund until after the death of Mrs. Cripps. And if the bond could be presumed satisfied, still the mortgage remained. *It had been said, that a mortgage was not recoverable after twenty years, but the Chief Baron knew of no case or principle which decided that.* In *Hele v. Hele*, 2 Ch. Ca. 28, the mortgage was sixty years old; and there were additional circumstances to induce a presumption that it was satisfied. In *Sibson v. Fletcher*, 1 Ch. Rep. 59, the court presumed the same thing, after a much shorter period, on the particular circumstances of that case, but no general rule was laid down, and he believed there was no case where a mortgage had been presumed to be satisfied from the non-payment of interest for twenty years, either in law or in equity; and *Leman v. Newnham*, 1 Ves. 50, was in point the other way, [that is, in favor of the principle which denies the application of the statute to this case.] A demand was made, the Chief Baron continued, in 1776, by the mortgagee,

till 1700; at which time an order of the bench was made to

and Mayre represented to him that the life estate in the mortgaged premises was still outstanding, which accounted for the mortgagee's forbearance from that time. The mortgagee shewed a reasonable indulgence, which ought not to be turned against him. In the case in Vesey, the Master of the Rolls denied that the jury would of course presume the bond satisfied; seeming to admit if the jury did find so, the court would in consequence presume the mortgage satisfied. The Chief Baron doubted of this proposition. If the collateral security had been a *note of hand* instead of a bond, the statute of Limitations would run against the note, and leave the mortgage as it was. If the jury went on the presumption of the bond being satisfied from there being no payment or demand for so many years, he could not think that the party would be prevented from shewing the truth of the case in a court of equity against such a presumption. Therefore, as far as the cross bill sought to set aside the bond and the mortgage, it must be dismissed. And it was dismissed accordingly.

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A similar point occurred in *Trash v. White*, 3 Bro. C. C. 291, Lord Thurlow there acknowledged the general principle of the rule, but thought, *that the presumption was as strong in equity to conclude the mortgagee after the expiration of twenty years, as it was at law to estop the obligee on a bond.* Mr. Belt, however, conceives (and with good reason), that Lord Thurlow did not use expressions amounting to this, because the case of *Toplis v. Baker*, which was adduced before him, distinctly marked the contrary, shewing, that in the case of a mortgage with a bond as a collateral security, though a jury might presume a mere bond to be satisfied, the case of a mortgage with a bond was very different, and that the court would, at any rate, let the mortgagee in to establish his case in equity.

Lord Thurlow's confirmation of rule.

In *Hatchet v. Finneaux*, 1 Lord Raym. 140, it was said, *per Holt*, Chief Justice, that if a man execute a bond, and make a mortgage by way of collateral security, although the mortgagee be not in possession for twenty years, and more, yet if the interest be paid upon the bond according to the agreement of the parties, the mortgage will not be barred by the statute of Limitations.

Mortgage being a collateral security, never discharged while interest paid on bond.

The points to be deduced from these cases are, that no rule exists in equity for presuming a release or satisfaction of a mortgage, after the lapse of a period of twenty years, or any other particular period of time, on the ground, that no notice has been taken of the debt due, either by payment of interest on the one side, or demand of principal or interest on the other; and that if a jury should on that ground presume the bond to be satisfied, which is given as a collateral security to the mortgage, yet the mortgagee will not thereby be prevented from shewing the truth of the case to the court, if in fact the money has not been paid; and it may fairly be inferred from the case of *Toplis v. Baker*, that if good cause can be shewn why the mortgagee forbore to demand interest, as in that case, because the mortgage was of a reversionary estate (a circumstance much relied on), the court will, on proof that the money is due, or in the absence of proof that it has been paid, decree in favor of the mortgagee, notwithstanding a period of more than twenty years

Expression of rule respecting mortgagor's continuation of possession twenty years.

deliver possession of the mortgaged premises to the mortgagee;

may have elapsed between the making of the mortgage and the last demand of principal or interest.

Allegations of infancy and coverture in ancestor of mortgagee must be particularly stated.

But though the rule may be thus favorably stated as it regards the mortgagee and his representatives, yet it will be incumbent on him to define particularly the period and essence of the acknowledgments which he avers to have taken place, and to shew, with accuracy, the commencement and continuance of every disability which he suggests as the cause of his forbearance. In *Blewit v. Thomas*, 2 Ves. jun. 669, the representatives of the mortgagee filed a bill against the heir of the mortgagor for relief and discovery, stating the mortgage and sum due thereon with a large arrear of interest; that the defendant was the heir at law of the mortgagor, and that he and his ancestors had been in possession of the estate mortgaged, and of the rents and profits thereof, ever since the execution of the mortgage assurance; that owing to infancy, coverture, or some other disabilities, the plaintiff had not been able, during a considerable part of the said time, to assert or prosecute his right to the said mortgage debt; that the suit, though abated, had never been dismissed or determined, and therefore that it had always been and then was, sufficient notice to the defendant of a subsisting demand in respect of the said mortgage; and that the defendant, ever since he had been in possession, knew that such mortgage was subsisting and unsatisfied, as would appear from the accounts, papers, and writings in his custody. The defendant pleaded in bar to all the relief and all the discovery prayed, alleging, that he and his ancestors and those under whom he claimed, had been in lawful and undisturbed possession of the estate in question, for their own absolute use and benefit, for forty years, without having paid over any rents, settled any accounts, or made any other acknowledgment of the mortgage by payment of interest or otherwise; and that therefore it was to be presumed, that the mortgage stated in the bill, if any such were made, had been long since paid, satisfied, and discharged. The Lord Chancellor thought that the defendant's plea ought to be allowed. It was a complete answer to the demand. If infancy or coverture would have availed the plaintiffs, it was not enough to say generally, that there had been infancies and covertures; for it was so completely a vague allegation that no issue could be taken upon it.

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Payment of interest on part of debt keeps alive residue, though no interest paid on that for fifty years.

It is open to further observation, that payment of interest on part of the debt, will keep alive the principal of the other part, although no interest may have been paid on that part for a period of fifty years. Thus in the case of *Loftus v. Swift*, 2 Sch. & Lef. 642, cited ante, 292, n. (D), A. being indebted to B. in the sum of 2300*l.* by sundry securities affecting his real estate, joined B. in transferring these securities, and the benefit and advantage thereof to C., for securing the sum of 1800*l.*, which was due from B. to C. B. never afterwards interfered in the affair, except that when C. demanded his first payment of interest, he referred him to A., who paid C. his interest on the 1800*l.*, and continued regularly to pay him interest on that sum for a period of fifty years; but never paid any interest on the surplus capital of 500*l.* either to B. or C. during that time. It was contended on the part of A. against B., that inasmuch as there had been no demand of in-

upon part of which he entered; but, as to the other part, the

terest beyond the sum of 1800*l.* from 1755 down to the time of filing the bill in 1806, it was to be presumed that the remaining principal money was paid. Lord Redesdale however said, he could find no ground for that presumption; mere non-payment, under such circumstances, did not afford any such ground. The person who had authority to receive was C. He contented himself with receiving the interest on the 1800*l.* He might have received the whole if he had thought fit; and if he had, he would have been answerable to B. for the excess; but *his neglect to enforce payment of any interest beyond the 1800*l.* could not raise any presumption of payment, neither could it bring the case within the statute of limitations*; the payment of interest preserved the demand, and the interest due was due upon the whole debt. As between A.'s family and B., no such debt as 1800*l.* existed; the debt as between them was 2300*l.*; and that debt was pledged to C. as a security for his demand. The payments of interest, though they amounted only to interest on 1800*l.*, were payments in respect of the mortgage debt due from the estate to B.; and the trustees of B. had a right therefore to say, that the existence of that mortgage debt, was sufficiently acknowledged to prevent any presumption against their title. And his Lordship so decided the case.

By the Irish statute of limitations (8 Geo. 1. c. 4.) twenty years are declared to be a bar to debts by *bond, judgment, and mortgage*, where no suit prosecuted for the recovery thereof, nor any interest of money has been paid thereon, or other satisfaction made, on account thereof, within the space of twenty years before the commencement of such suit. On the interpretation of this statute it hath been held, by the unanimous opinion of Lord Clonmell, C. J. and Boyd and Downes, Js. that a judgment which has lain dormant for more than twenty years, shall not be revived by means of a promise, by the cosutor of the judgment to pay the amount thereof, made within twenty years next before the issuing of the *sci. fa.* thereon. *Maddock v. Bond*, Irish T. R. 335. 349. Lord Manners doubted the propriety of introducing this decision into a court of equity; and held (*Barrington v. O'Brien*, 1 Ball & Bea. 173—1809. Bill filed in 1796), that a decree which was pronounced in 1756, declaring that a portion was well charged on certain real estates, should be carried into execution, though not proceeded on for *forty* years, there being an acknowledgment, *within twenty years* prior to the filing the bill, of the subsistence of the charge, and other circumstances of fraud appearing on the case. Frequent applications to the owner of the estate, were proved to have been made for payment of the portion, by the person who was entitled to it, to which the answer was, not that the statute was a bar, or that the portion was not due, but either an amusing promise that the application should be considered, or an intimidation that if such demands were insisted on, suits would be instituted by other creditors for payment of debts. This, said Lord Manners, was very different from a defence arising from length of time as a bar. The conduct of the defendants consisted in an acknowledgment of the demand, and an endeavour to curtail it; and his Lordship thought, from the direct testimony of Sir Jonah Barrington, to which he gave every degree of credit, that Molony, the solicitor and agent of the defendant's, had kept alive

Irish statute of limitations. Acknowledgment of debt within last twenty years revives it, though forty years have elapsed. Secus at law.

mortgagor continued in possession till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714.

the demand, and that there was a positive promise by both the defendants to pay the portion, particularly when it appeared that the demand had never been denied; that it was a family case; and that in 1756 the then Lord Chancellor decreed it to be a subsisting charge. And Lord Manners declared that the plaintiff was entitled to the benefit of the decree of 1756, with interest, from the confirmation of the report.

Tender by mortgagor to agent of mortgagee, twenty-four years ago, this, under slight circumstances, enough to keep debt alive.

The case next occurring in chronological order is strong in corroboration of the doctrine, that no time is fixed on for the presumption of payment or satisfaction of the mortgage debt. It is an Irish case, confirmed by the English House of Lords. The circumstances of which were to the following effect:— One Barnard became possessed of a mortgage of estates in Ireland. In 1736 he went to England (leaving a receiver and agent of his estates), where he resided till the time of his death, which happened in the year 1783; forty-seven years from the time of his leaving his native country. During this period the mortgagor, (in the year 1754,) made a tender of the principal and interest due on the mortgage to the receiver, who refused to accept it, alleging, that he had no authority. The mortgagor afterwards in 1759, filed a bill for redemption and a re-conveyance, to which the mortgagee never answered, and there the matter rested: the mortgagor from that time discontinuing his payments of interest, and the receiver never demanding them. Shortly after the death of the mortgagee in 1783, a bill was filed in the Irish Court of Exchequer, by his representatives, against the heir of the mortgagor, for an account and payment of principal and interest due on the mortgage, or in default thereof, for a foreclosure and sale; and in 1808 it was decreed accordingly, with interest, to be computed from 1759. To this decree an appeal was lodged in the English House of Lords, by the heir of the mortgagor, treating it as a hard case, to be decreed to pay interest on a debt which had lain dormant twenty-four years. A peculiarity of disposition arising from the death of an only son, was alleged as a reason for the averseness of Barnard to attend to this or any other business. There was also some slight evidence of admissions, by the appellant's father and grandfather, in or about the year 1788, of a debt due on their estate to Barnard. For the appellant it was argued, 1st. that acquiescence for twenty-four years, raised a presumption that the mortgaged debt was discharged; 2d. that at any rate, interest ought to cease from the time of tender, or at least from 1759. To which it was replied, 1st. that there was not any such rule as the one contended for; citing *Leman v. Newnham*, and *Trask v. White*, ubi supra; and 2d. that tender to one who had no authority to receive amounted to nothing; and thereupon the judgment of the Court of Exchequer was affirmed. *Meade v. Banden*, 2 Dow. P. C. 268.

Of the rule as it at present stands.

The result of this latter class of cases appears to be, that no fixed period is ascertained beyond which the debt on mortgage shall be presumed to be satisfied. But it may be inferred from the whole tenor of the decided cases on this head, that the court would not be active in extending its relief to the mortgagee beyond a period of about twenty years. The two analogous cases of

*History v. Walker
12 Dec. 266.*

From the death of the mortgagor, the mortgagee had possession of the whole. A bill was brought to redeem in 1726;

Jones v. Turberville, 2 Ves. jun. 11. and *Pickering v. Stamford*, *ibid.* 272. afford the first symptoms of a disposition to establish a climacteric; but they have fixed on periods so dissonant with the general principles of the court, that at the present day, it is conceived, those periods would not be followed. In the first case it was determined, that a legacy not demanded for forty years should be considered as *prima facie* satisfied; but it was in the same case held, that this presumption was not so absolute as to support a demurrer to a bill for such a legacy; for the point of satisfaction being an inference only, arising from the length of time which had elapsed from the period the legacy became payable, it might be repelled by *clear, strong, and relevant evidence*. In the second case the Master of the Rolls decided on a claim, to a share of residuary property, which was thirty-five years old, and said, that if the case before him had been that of a legacy, he should have been of opinion, that a bar had been incurred from the length of time which had elapsed, upon the ground of presumptive satisfaction. On the other hand, an account has been directed in another case after thirty years acquiescence. *Kingsland v. Tyrconnel*, Lord Harcourt MS. Tables. Et vide as to legacies, *Parker v. Ash*, 1 Vern. 256. *Ord v. Smith*, Sel. Ch. Ca. 2. 9. *Fotherby v. Hartridge*, 2 Vern. 21. and *Higgins v. Crawford*, 2 Ves. jun. 571. But notwithstanding a precise period has not been definitively fixed, a noble lord of the last century, has strongly marked the broad rule which courts of equity have laid down for their guidance in cases of this kind; and, we have seen, in a preceding note, ante, 387, that the present Master of the Rolls has recently recognized and acted upon it. "A court of equity," says Lord Camden, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but *conscience, good faith, and reasonable diligence*; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discouraged; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith v. Clay*, Amb. 645. Et vide the case mentioned by Lord Erskine, as having been heard before Lord Mansfield, cited post, 399.

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A material branch of the subject still remains to be considered.—When a mortgagee has been in possession such a length of time as will induce the court to presume that the equity of redemption is lost or deserted, a second presumption at the same time arises, that a conveyance or an assignment, or some other transfer of it, has been made to the mortgagee, Fonbl. Tr. Eq. 333, 5th edit.; but whether the rule will hold *à contra* is a different and more difficult question, and requires investigation. It has been remarked in a former page, ante, 109, that on payment of the debt, the mortgagee will become a trustee for the mortgagor as to the outstanding legal estate, and all derivative and incidental interests dependant thereupon. The like consequence will ensue, whether the debt be actually paid by the mortgagor, or whether from effluxion of

Conveyance of equity of redemption presumed.

and it was so decreed at the Rolls: and the decree was affirmed by Lord Chancellor King, who said nothing was more clear.

As to presumption of re-conveyance of legal estate from mortgagee.

time, the court, according to the foregoing rules, will presume it to have been paid or abandoned. In both cases, the mortgagee will equally become a trustee of the legal estate for the person entitled to the equity of redemption, *Cholmondeley v. Clinton*, 2 Meriv. 361: and it was formerly a rule to require a re-conveyance of such legal estate, however great the length of time might have been since it first became outstanding. Sugd. V. & P. 295, 5th edit. But a late case (*Hillary v. Waller*, 12 Ves. 239) has introduced this qualification, namely, that if the circumstances of the case are sufficient to induce a court of law, under the grounds on which presumptions are in general raised, to presume a re-conveyance, a purchaser of the estate from the mortgagor, will be compelled to take the title, without requiring of the mortgagor, the production of a re-conveyance of the legal estate from the mortgagee, or his heirs. The report of this case is full and strong, and pointedly relevant to the matter in hand.

Conveyance of legal estate presumed after great length of time.

In the year 1664 the legal estate in a certain farm, called Fingreth Hall, was conveyed to a trustee by way of indemnity to a purchaser of another estate, upon trust, among other things, that if the purchaser should not be legally evicted out of the estate he had purchased, before the expiration of eleven years next after the decease of certain tenants for life. that then the said trustee, his heirs and assigns, should reconvey the said farm called Fingreth Hall Farm to the persons then entitled to the same under an indenture of settlement therein recited. The bill was filed in 1804 by the owner of the farm so conveyed to the trustee, praying the specific performance of an agreement by the defendant to purchase the said farm and lands called Fingreth Hall Farm. The defendant objected to the title, on the ground, that the legal estate in fee of the manor and farm of Fingreth was then outstanding, and could not be got in; and that though the plaintiff and those under whom he claimed, had been in possession of the premises for 140 years, yet that there was not any feature in the case whereon to presume a re-conveyance of the legal estate. On the hearing at the Rolls it was argued for the defendant, that presumption was a matter of fact; and the question was, whether there was evidence upon which a jury could, upon their oaths, say, that they believed there had been a reconveyance? That the Judge in a court of equity was, upon this question, acting in the province of a jury; that there was no evidence of a reconveyance, except what arose by way of presumption from length of time; and that neither a court nor jury could say, that there was reason to believe, that a reconveyance had actually been executed. But Sir W. Grant, M. R. said, the true question was, whether a reconveyance of the legal estate ought, under the circumstances of the case, to be presumed? If it ought, then it was not an equitable, but a legal title, that the defendant was desired to take. He agreed that length of time did not by itself furnish the same sort of presumption in this case, as it did in a case of *adverse* possession. Long continued possession implied title, as, if there were a different right, the probability was, that it would have been asserted. But undisturbed enjoyment did not shew, whether the title was equitable or legal. It did not follow,

than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole; for part of the

however, that a conveyance of the legal estate could be the subject of presumption; though the presumption was made upon a different ground. Lord Kenyon, though disinclined to permit ejectments to be maintained upon equitable titles, always admitted that it might be left to the jury to presume a conveyance of the legal estate; and so far Lord Kenyon acceded to Lord Mansfield's doctrine in *Lade v. Holford*, Bull. Ni. Pri. 110 a. (although he was dissenting from that of some other cases), in which a legal estate, clearly outstanding, was held to be no impediment to a recovery at law by the party beneficially entitled. And on what ground, the Master of the Rolls asked, was such presumption to be made? On this; that what ought to have been done should be presumed to have been done. When the purpose was answered for which the legal estate was conveyed, it ought to be re-conveyed.

Presumption, continued Sir W. Grant, did not always proceed on a belief, that the thing presumed had actually taken place. Grants were frequently presumed, as Lord Mansfield said in *Eldridge v. Knott*, Cowp. 215, merely for the purpose, and from a principle of, quieting the possession. There was much occasion for presuming conveyances of legal estates, when, from length of time, it had become impossible to discover in whom the legal estate (if outstanding) was actually vested, as otherwise titles must ever remain imperfect, and in many respects unavailable. If the period at which the legal estate ought to have been reconveyed could have been ascertained, Sir W. Grant saw no reason why the presumption of its being re-conveyed at that period, should not be made. At what precise moment the danger of eviction ceased, it was impossible to say. But if the time that had elapsed without claim, one hundred and forty years, did not furnish the inference that none could be made, then his Honor knew not what period would be sufficient for that purpose. The court, as Lord Hardwicke said, in the case of *Lyddall v. Weston*, 2 Atk. 19, "must govern itself by a moral certainty; for it was impossible in the nature of things that there should be a mathematical certainty of a good title. There were often suggestions of old entails, and often doubts what issue persons had left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate." The evidence of an actual re-conveyance, the Master of the Rolls added, was, in the case before him, slight and inconclusive. But on the general grounds he had before stated, he conceived that there was no court, before which a question concerning this title could come, that would not, under all the circumstances of the case, itself presume, or direct a jury to presume, that the legal estate had been re-conveyed. It was therefore such a title as a purchaser might safely take, and the defendant ought consequently specifically to perform his agreement. A specific performance was decreed accordingly.

From this decree the defendant appealed to the Lord Chancellor (Erskine) who stated the question to be, whether, under all the circumstances, he ought to consider this a good title? The presumption in courts of law, from length of time, stood upon a clear principle, built upon reason, the nature and character of man, and the result of human experience,—it resolved itself into this,

Continuation of Sir W. Grant's judgment in Hillary v. Waller.

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Conveyance of legal estate presumed in equity, where similar presumption would be made at law.

chambers he might redeem as being in possession thereof, and part he could not, separately from the whole; therefore he

Anon. case.

that a man would naturally enjoy what belonged to him; that was the whole principle. Then, as to a presumption of title; 1st. as to a bond taken, and no interest paid for twenty years, nay, within twenty years, as Lord Mansfield had said, but upon twenty years, the *presumption was, that it had been paid*, and the presumption would hold, unless it could be repelled, unless *instancy*, or a state approaching it, could be shewn, or that the party was a near relation, or the absence of the party having a right to the money, or something which repelled the presumption, that a man was always ready to enjoy what was his own. The case of a mortgage was an instance. His Lordship remembered a case before Lord Mansfield, where a mortgagee brought his ejectment. The mortgagee had not received any money upon the mortgage for twenty-five years, though living within a street of the mortgagor; and upon that, the mortgage was considered satisfied. It had been said you cannot *presume*, unless you *believe*. It was because there were no means of creating belief or disbelief, that such general presumptions were raised, upon subjects of which there was no record or written muniment. Therefore, upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming any thing like belief, the legal presumption would hold the place of particular and individual belief. Here then was the application of these principles. A conveyance was necessarily to be presumed from the trustee of the estate, intended as an indemnity against an incumbrance, when, for a century and more every idea of an incumbrance had been at an end; and if these presumptions were made after twenty or thirty years, because the party was out of possession, all presumption was against him in the present instance. It would have been very different, added Lord Erskine, if the intention had not appeared on the deed. But when the time was designated, viz. eleven years, if it could not be done at the end of one hundred and forty years, the defendant's objection must continue for ever, which would be a rule most dangerous, and destroy the very reason of legal presumptions. In conclusion, the noble Lord stated his opinion to be, that at this distance of time he ought to presume, that this re-conveyance had been made, and he made that presumption accordingly, without sending it to law, being confident that a judge must tell a jury they ought to presume, and they would presume the execution of this re-conveyance. This being Lord Erskine's opinion, the decree of the Master of the Rolls was consequently affirmed.

Re-conveyance of legal estate presumed after lapse of 140 years.

As to cases where such presumptions are made at law.

Where, therefore, a judge and jury will presume a re-conveyance or surrender of the legal estate *at law*, a court of equity will of itself adopt a similar presumption in favor of the mortgagor, and his heirs, without sending him elsewhere. It becomes then necessary to inquire, after what length of time a re-conveyance or surrender will be presumed *at law*. The investigation of this question will involve a variety of details, and the present note is already too dilated; the subject is discussed at length, *infra*, 496, et seq. We shall merely remark here, that no less time than twenty years will raise a *presump-*

should redeem the whole. If the mortgagee were in possession for twenty years, and no interest paid, there should be

tion at law, that a mortgage term has been assigned or surrendered. This was settled in *Doe v. Calvert*, 5 Taunt. 170, and a similar remark may be made, as to the presumption of a re-conveyance of the legal estate on an abandoned mortgage in fee. Then, whether this twenty years possession is to be an adverse possession, and whether the possession of the mortgagor, is, as against the mortgagee, a possession of that nature, are questions which we must at present postpone. But we cannot dismiss the subject without adverting to the observations of Mr. Preston, in his 2d vol. of Abs. p. 21, where he remarks, that the late decision in *Cholmondeley v. Clinton*, 2 Meriv. 171, "has (if right in principle) greatly shaken the confidence which, in practice, used to be placed on these presumptions." By later decisions, however, the courts have evinced a decided disposition to make every reasonable presumption where it can be practically effected; and as to what is said by Mr. Sugden, in his valuable *Trea. on V. & P.* p. 295, 5th edit. with respect to the disapprobation which the case of *Hillary v. Waller* met with at the bar, it is observable, that nothing inequitable appears on the face, or in the tendency, of that determination, to suggest a reason why it should not now be adopted and followed. It may be true, that it was in opposition to an old and highly inconvenient rule observed by conveyancers, (and that perhaps forms the total amount of objection to the adjudication), but the substitution of a well-adapted rule of analogy, (which, it is conceived, may now be considered as established), for one which was often practically impossible to be adhered to, and always attended with much trouble and expence, should form an argument, the rather in support of the decision, than in derogation of it. When it is said, that the decision in *Hillary v. Waller* has occasioned considerable difficulties in practice, by introducing an indefinite rule, whereby no man can say where exactly the line is to be drawn, at what period the presumption is to arise, and what circumstances are sufficient to rebut it; it should be remembered that no such doctrine was promulgated by the court. A definite period was fixed on, in analogy to the time at which courts of law raise similar presumptions, namely, "not less than twenty years," implying, that *prima facie*, after twenty years, a court of equity will raise the presumption of a re-conveyance from the mortgagee or his heirs,—the period wherein a presumption of payment of the mortgage money will also arise. In a late case (*Cooke v. Sollau*, 2 Sim. & Stn. 154), the learned author of *Vend. & Purch.* reiterated his objections to the decision in *Hillary v. Waller*, but his Honor the Vice-Chancellor, determined in conformity with it. The case is noticed at more length, *infra*, 509.

As to interest, and the state of the account, where the mortgagee has suffered both his money and the pledge to remain in the hands of the mortgagor and his heirs for a long series of years, but not for such a period as will bar him of his debt and mortgage, and payment of the money or foreclosure is decreed against the mortgagor, the rule is, that if the mortgagee and his representatives have slept upon their rights, and no compromise or discussion of their claims has taken place, and the defendant is ignorant thereof; and there is no disability on the one side, nor fraud on the other, interest will not be

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Mr. Sugden's observations on Hillary v. Waller considered.

Re-conveyance of legal estate presumed after twenty years, where money can be presumed paid.

Rule as to interest and account when mortgagor decreed to pay money or be foreclosed.

no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 till 1714 the plaintiff was an infant, so that was accounted for, and from that time it did not amount to twenty years.

given, nor an account of the rents and profits directed further back than the filing of the bill. But if the delay be fully accounted for, on the grounds which constitute the exceptions to the above rules, interest will be carried much further back. *Barrington v. O'Brien*, 1 Ball. & Bea. 180. Lord Manners took the rule to be, in the lastly cited case, that it was only where a party had actually slept upon his rights, *the other party being ignorant thereof*, that a court of equity would not interfere or be called into activity; but when a party had been amused by promises of payment or compromise, equity would not consider itself bound by such a rule.

Effect of statute of limitations, and its equitable analogy on pawns of personality.

To conclude this protracted note, it is finally observable, that in reference to pawns of personal chattels, a right of redemption remains to the pawner during the period of his life, if no time be stipulated for payment of the money on entering into the original contract for the loan. But this right is personal, and dies with the pawner, consequently his executor cannot redeem. *Radcliffe v. Davis*, Yelv. 178. S. C. Cro. Jac. 244. Bulst. 26. At common law a similar rule prevailed as to the mortgage of real property. If no time were appointed for payment of the money, the mortgagor had his whole life for payment of it. Co. Litt. 208 b. With reference to pawns, the distinction is, that it may be redeemed after the death of the pawnee, but not of the pawner. 3 Salk. 267. In *Kemp v. Westbrook*, 1 Ves. 278, an assignee of a bankrupt pawner, after a lapse of *twenty-one* years from the time of the first depositing the pawn, filed a bill against the pawnee (Westbrook) for the re-delivery of the jewels and plate pledged by the bankrupt to the defendant, who had also given a promissory note for the delivery over of those goods to the bankrupt, or the value of them, upon the bankrupt's paying him all that was due. The statute of Limitations was insisted on by way of defence, which, being to quiet possession, was to be construed favourably. Besides, the plaintiff, it was further contended, had no right to come into equity, this not being like the case of a real estate, where time was given for payment, and on non-payment to vest in the mortgagee, for there the remedy must be in equity as there was none at law; but this was a mere pledge, and if allowed, there would be an infinite number of bills for redemption of such deposits; trover would lie in the same manner as if the pawn had been disposed of, and then after the time limited by the statute for an action of trover, it could not be recovered, notwithstanding the right to redeem. But Lord Hardwicke said, there was no colour for the statute's being a bar to this demand; no time being given for redemption, the bankrupt had time during his life to redeem, according to the case in *Bulstrode*. Then, so had the assignee till tender or payment of the money; before which, on the face of the note, trover would not lie. Besides, the plaintiff being an absolute stranger to what was due, he had a right to come into equity to ascertain the amount, in order to make a tender, which he could not do without tendering the *precise amount*, [*S. L. Robinson v. Cooke*, 6 Taunt. 356], and therefore could never make it, if not allowed to come into equity first to

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Redemption of pledge decreed after twenty-one years.

But, in this case, the court would not enter into the question, until they were satisfied the benchers had given the parties leave to try it by law, saying, that this regard was to be had to all societies at law, that all their disputes might be determined amongst themselves; and the court having determined the right, ordered, that the benchers should settle

No proceedings in courts above respecting chambers, unless benchers give consent.

know that sum. His Lordship referred it to a Master, to take an account of what was due to the defendant for principal, interest, and costs, and what was the value of the articles pledged, and if any part had been sold, what the defendant had received for the same; and if, on a balance of accounts, the defendant appeared to be over-paid, then he was decreed to pay such surplus, and deliver such of the articles pledged as remained in specie to the assignee, for the benefit of the creditors under the commission. *Belt's Supp. to Ves. sen. 141.*

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continued.

For further as to presumptions arising from length of time *et à contra*, see *Reference to further cases.* *Gird v. Toogood*, Nels. 34. *Coles v. Emerson*, 1 Ch. Rep. 78. *Mitchell v. Chamberlain*, Toth. 169. *Frazer v. Moore*, Bunb. 54. *Bridges v. Mitchell*, *ibid.* 224. *Astrey's case*, 2 Freem. 55. *Winkfield v. Whaley*, 5 Vin. Abr. 534, pl. 38. *Llewellyn v. Mackworth*, Barn. 445. *Cotterell v. Purchase*, Ca. temp. Talb. 61. *et vide* 69. *Huckstep v. Matthews*, 1 Vern. 362. *Huet v. Fletcher*, 1 Atk. 467. *Sturt v. Mellish*, 2 Atk. 610. *Lacon v. Briggs*, 3 Atk. 105. *Doe v. Prosser*, Cowp. 217. *Brownell v. Brownell*, 2 Bro. C. C. 63. *Jones v. Turberville*, 4 *ibid.* 115. *Andrews v. Wrigley*, *ibid.* 125. *Lytton v. Lytton*, *ibid.* 441. *Pickering v. Stamford*, *ibid.* 214. *Hercy v. Dinwoody*, *ibid.* 257. *Gould v. O'Kedin*, 4 Bro. P. C. 198. Toml. edit. *Pomfret v. Windsor*, 2 Ves. 483. *Bonny v. Ridgard*, 1 Cox, 145. *Higgins v. Crawford*, 2 Ves. jun. 572. *Pearson v. Belcher*, 4 Ves. 627. *Yate v. Moseley*, 5 *ibid.* 480. *Campbell v. Walker*, *ibid.* 678. *Moth v. Atwood*, *ibid.* 845. *Seton v. Slade*, 7 *ibid.* 273. *Stackhouse v. Bamston*, 10 *ibid.* 467. *Parkes v. White*, 11 *ibid.* 226. Tr. Eq. lib. 1. c. 4. s. 27. *Purcell v. M'Namara*, 14 Ves. 91. *Hardwicke v. Vernon*, *ibid.* 504. *Baillie v. Sibbald*, 15 *ibid.* 185. *Colchester v. Lowton*, 1 Ves. & Bea. 246. *Bond v. Hopkins*, 1 Sch. & Lef. 427. *Underwood v. Courtown*, 2 *ibid.* 41. *Murray v. Palmer*, *ibid.* 474. *Medlicott v. O'Donnell*, 1 Ball & Bea. 166. *Egremont v. Hamilton*, *ibid.* 516. *Gregory v. Gregory*, Coop. 201. *Whalley v. Whalley*, 1 Meriv. 436. 442. *Whatton v. Toone*, 5 Madd. 54. *Daniel v. Golby*, before the Vice Chancellor, 27th Feb. 1818. *Dewdney Ex parte*, 15 Ves. 497. *Easterby v. Pullen*, 3 Stark. 186. *Doe v. Pettett*, 5 Barn. & Ald. 223. *Tucker v. Sanger*, 13 Price, 119. As to revival of debts barred by length of time, by means of a devise for payment of debts generally, see *Ketilby v. Ketilby*, cited 2 Anstr. 525, and ante, 357 a, in *notis*, where simple contract debts seventy years old were revived. See also *Beckford v. Wade*, 17 Ves. 87, a case decided in the privy council, where seven years possession in Jamaica are said to be a bar to every claim, the effect of this possessory law in Jamaica, being to bar not merely the legal remedy, but every suit, claim, and demand, converting seven years possession into a positive absolute title. *Revival of debt by devise.*

what was due for principal, interest, and costs, and take an account of the several receipts and allowances.

Of the parties to a bill to redeem (x).

On a bill brought to redeem a mortgage of long standing, an objection was made for want of parties (g); namely, that as

(g) *Yates v. Hambly*, 2 Atk. 237.

Executor and person having legal estate necessary parties. Secus, as to heir of mortgagor.

(K) If the heir of the mortgagee file a bill to redeem, the executor or administrator of the mortgagee must be made a party. 2 Freem. 52. But the heir of the mortgagor need not be a party to a bill to redeem by the devisee of the equity of redemption, ante, 348. It is also particularly essential to remark, that on a bill to redeem, the person having the legal estate must be before the court, for otherwise the mortgagor cannot have a complete reconveyance. *Wood v. Williams*, 4 Madd. Rep. 186. *Schoole v. Sell*, 1 Sch. & Lef. 176.

Person entitled to equity of redemption in another estate, necessary party, when.

If both Black and White Acre are mortgaged to A. for distinct debts and at several times, and afterwards the equity of redemption of Black Acre is sold to B., he cannot, we have seen, (ante, 340) redeem the mortgage on Black Acre, without redeeming the mortgage on White Acre also; and in that case, the parties interested in the equity of redemption of the second mortgage will be necessary parties to the suit. *Ireson v. Dena*, 2 Cox Ch. Ca. 425. So, where two estates were mortgaged together, and on the death of the mortgagor, the equity of redemption of the one devolved on A. and that of the other on B., B. was held to be a necessary party to a bill by A. for redemption. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 2. infra, vol. ii.

Mortgagee, his trustee, and cestui que trusts, necessary parties to a bill for redemption, and mortgagor must pay costs of making them so.

In the case of *Wetherell v. Collins*, 3 Madd. 255, a bill was filed by a mortgagor for redemption. The mortgagee had assigned the mortgage upon certain trusts for the benefit of his family. The mortgagee, the trustees, and the cestui que trusts, were all made parties defendants; and upon the hearing a question was made as to the costs of the trustees and the cestui que trusts, which the plaintiff urged he ought not to pay, because they were not necessary parties to the suit by his act, but by the act of the mortgagee. The Vice Chancellor observed, that it seemed at first sight a great hardship, that the mortgagor should be liable to pay the costs of persons claiming under the mortgagee and made necessary parties by this act, but it was the constant course of the court, and it was to be supported upon this principle, that at law after a mortgage was forfeited, the estate was the absolute property of the mortgagee, and he might deal with it as his own; and that if the mortgagor came for redemption, which the equity of the court gave him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts.

Cestui que trusts not being parties, may (by indulgence of court) be made so on short petition.

The doctrine that cestui que trusts are necessary parties to bills to redeem, has been still further confirmed by the late case of *Drew v. Harman*, before the Lord Chief Baron Richards, sitting in Equity in the Exchequer Chamber, 5 Price, 319. Estates sold to B. were, prior to the sale, collaterally charged by the vendor's testator for the purpose of securing a bond debt to the tes-

there had been an absolute conveyance made of this estate by the mortgagee without any clause of redemption, with several limitations over, the persons in remainder under this conveyance ought to have been parties. *Et per curiam*: when a mortgagee, who has a plain redeemable interest, makes several conveyances upon *trust*, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

First tenant in tail under limitations by mortgagee must be before court (L).

tator's widow and children. The purchaser retained in his hands part of the purchase money, as an indemnity against any claims which might be made on the estate in respect of the bond debt, and executed a mortgage to the vendors for securing the money so retained; but it was stipulated, that the plaintiff, who was the purchaser, should be at liberty to apply the mortgage money for his protection in satisfaction of the trusts. After these transactions, the vendor disputed the validity of the bond, and the obligees claimed the debt out of the estate. A bill was then filed by the purchaser against the vendor, praying a discovery of the persons entitled, &c. the plaintiff paying principal, interest, and costs, into court—that plaintiff might redeem, and defendant re-convey the premises. The Lord Chief Baron observed, that in *strict regularity*, the *cestui que trusts* should have been made parties to the suit, but to obviate that difficulty without further delay or expence, he recommended a short petition to be considered of, on the part of the widow and children, that their interests might be ascertained and their rights protected; and his Lordship ordered the cause to stand over, *pro forma*, in the mean time, with liberty to present such petition; which being afterwards presented, stating in substance the above facts, the money in court was ordered to be transferred to them in due proportions, the costs of the petition to be borne by themselves.

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As to the necessary parties to a bill of foreclosure, see post, vol. ii, 963; and as to the parties to a bill to redeem a Welch mortgage or the Irish *vipus vadium*, see Index, voce "Lease and Loan," "Welch Mortgage." And here note, that on a bill to redeem, the time will not be enlarged as on a bill to foreclose. *Novosielski v. Wakefield*, 17 Ves. 417.

Time not enlarged on bill to redeem.

(L) So, on the other hand, the first tenant in tail of the equity of redemption must be before the court on a bill of foreclosure. *Reynoldson v. Perkins*, Amb. 564.

Bill by second mortgagee to redeem first, mortgagor or his heir must be party (M).

But on a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heir must be brought before the court; because without him complete justice cannot be done between all parties.

Heir being abroad, court cannot proceed (N).

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H., the elder, and H., the younger (his second son) by surrender, conveyed the reversion of copyhold estates (after the decease of H. the elder) to B., in fee, subject to redemption on the payment of 30*l.* and interest, and B. was admitted tenant to the land (*h*). The estate was afterwards charged with a farther sum lent to H. the elder, and H. the younger by B. Then H. the younger, who survived his father, devised the estate to S. H., subject to the mortgage and died. Afterwards S. H. surrendered the same estate, subject to the first mortgages, to F. in fee, to secure the re-payment of a sum borrowed of F. by himself. And by a deed bearing even date with the last-mentioned surrender, the uses thereof were declared to be in trust to sell the same, and in the first place to pay himself the money by him advanced, with interest, and to pay the surplus to S. H., his heirs, executors, or administrators. F. was admitted tenant to the lord. Then B. the first mortgagee, entered into possession of the said copyhold estates. S. H. died, leaving R. H., of Baltimore, in the province of Maryland, his

(*h*) *Fell v. Brown*, 2 Bro. C. C. 276. 1 Cox Ch. Ca. 411, cited *infra*, vol. ii. Et vide *Howes v. Wadham*, Ridgw. 1041, Chap. xxi. "Foreclosure," for Rep. 200. S. L. [and *Fishwick v. Low*, which see list of cases.—Ed.]

(M) And *that*, though the second mortgage be of part only of the estate comprised in the mortgage, and under a different title, *Palk v. Clinton*, 12 Ves. 48; but it is not necessary to make his *personal representative* a party, post, 405.

Heir abroad.

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(N) If the heir of the mortgagee cannot be found, an act of parliament will be necessary to revest the estate in the mortgagor. *Schoole v. Sall*, 1 Sch. & Lef. 177, cited *ante*, p. 15, note (L). In one case however, (*Walley v. Walley*, 1 Vern. 487), where a necessary party was beyond sea, and the plaintiff made an affidavit thereof, and that he knew not whether such defendant were living or dead, he was allowed an order, upon motion, to proceed against the other defendants without prejudice; and, as Mr. Vernon states, afterwards had a decree without bringing such defendant to a hearing, but that decree does not appear in the Register's Book. See also, on this subject, *Heath v. Percival*, 1 P. Wms. 684.

heir at law. F. filed a bill against B., and R. H., charging the latter to be abroad in America, and praying an account of what was due to B. for principal and interest, and that B. might account for the rents and profits, and pay to F. what should appear to be due to him, after paying such principal and interest, and in case that should not be sufficient to satisfy F.'s demand, that the estate might be sold, and proper parties join for that purpose, and F. be paid out of the purchase-money, and the residue paid and applied as the court should direct. B. by his answer acknowledged the possession, and said, that he was ready to account to such person as should appear to be entitled to the equity of redemption; but that he did not know who was so entitled, not knowing what was become of T. H., whether he was living or dead, or whether he was ever married, or had left any child or children. One question which arose in the cause was, whether there were proper parties before the court, the supposed heir at law of T. H., the mortgagor, being in America, and his personal representative not being before the court. On the part of F., it was insisted that there were sufficient parties; that B. had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the first and second mortgagees, it was not necessary to make the mortgagor a party. All the decree was redemption of the first mortgage, and a conveyance to the second, not an account of rents and profits, unless the mortgagee was in possession. That neither the mortgagor, nor the first mortgagee were hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee was liable to no farther account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and if he should do otherwise, being liable to all charges which might have been made against the first mortgagor in his account, with the original mortgagee. *Sed per curiam*: it is impossible that a second mortgagee should come into this court against a first mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that

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the mortgagor shall redeem him or stand foreclosed (o). It therefore must be necessary to have the real representative before the court, though it is not necessary to have his personal representative (p).

Mortgagee having assigned, not a necessary party (q).

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee as standing in his place will be decreed to convey (i).

Bill brought to redeem a mortgage against one who was then an ambassador in Spain—the court ordered all proceedings to delay for a year and a day, unless the ambassador should return sooner from his embassy (ii) (r).

Act to prevent clandestine mortgages.

There is one case in which the legislature has thought proper to take from the mortgagor the equity of redemption, and

(i) *Hill v. Adams*, 2 Atk. 39. [S. L. infra, vol. ii. 953, n. (M), though otherwise stated in the text there.—Ed.]

(ii) *Pilkington v. Stanhope*, 2 Vern. 317.

Text confirmed.

(O) In the case of *Palk v. Clinton*, 12 Ves. 59, this doctrine was fully confirmed by Sir W. Grant, M. R.; and his Honor mentioned a case of *Woodcock v. Mayne*, from Lord Nottingham's MSS., in which it was held, that a second incumbrancer could not file a bill to redeem prior incumbrances without the mortgagor.

(P) As to this point, see 3 P. Wms. 333, n. A., and *Bradshaw v. Outram*, 13 Ves. 234, which was the case of a mortgage for years, and it was there held, that the *personal representative was not a necessary party to a bill of foreclosure*.

Mortgagor when not a necessary party.

(Q) And the mortgagor having assigned his whole equity to a purchaser, need not be a party to a bill to redeem by such purchaser, nor indeed to a bill for that purpose by a subsequent incumbrancer, if such subsequent incumbrancer have notice of the assignment of the equity of redemption.

Reasons for rule in text.

(R) This, perhaps, on the authority of Co. Litt. 130 a, (3 Thomas's edit. 395), where it is said (speaking of protection due to certain persons) "this is of two natures, the one concerns services of war, as the king's soldiers, &c.; the other wisdom and counsel, &c. as the king's ambassador or messenger *pro negotiis regni*. Both these being for the public good of the realm, private mens' actions and suits must be suspended for a convenient time, for *jura publica anteferenda privatis*."

to give the mortgagee an absolute estate in the land; that is, where the former is guilty of a fraud upon the latter by concealing prior incumbrances (s). In such cases it is enacted, by the 4 & 5 W. & M. cap. 16, that if any person shall *borrow any money, &c.* or become indebted for any *other valuable consideration*; and, for the payment thereof, shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of another, or for other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands to the second lender, or to any other person in trust for him, and shall not give notice to the mortgagee of such judgment, &c. in writing, before the execution of the said mortgage or mortgages; such mortgagor shall have no benefit in the equity of redemption of the lands mortgaged, unless such mortgagor or his heirs, upon notice given by the mortgagee in writing under hand and seal, attested by two witnesses, of such former judgment, &c. shall within six months pay off and discharge the same, and cause the same to be vacated and discharged. And if any person, who shall once mortgage lands for valuable consideration, shall again mortgage the *same lands*, or any part thereof, to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee, the first mortgage; such *mortgagor* shall have no relief or equity of redemption against the second mortgagee; but

Equity of redemption forfeited by concealing prior mortgages.

(S) Effecting a second mortgage, without giving notice to the second mortgagee of the existence of the first incumbrance, was deemed by the Roman lawyers a species of infidelity amounting to a crime, denominated in their language *Stellionatus*, and the person committing it was punishable according to the knavery of the case; but the crime was not imputed to him who mortgaged the same land or tenement to several creditors, whose debts, when they were all put together, did not exceed the value of the land or tenement mortgaged. Thus, in the Pandects, lib. xxxvi. ff. *de pign. act.* it is stated, "*plene si ea res ampla est, et ad modicum aris fuerit pignolata; dici debet, cessare non solum stellionatus crimen, sed etiam pignoratitium, et de dolo actionem: quasi in nullo captus sit, qui pignori secundo loco accepit.*" Dig. 13. 7. 36. 1. The spirit of this passage is engrafted in the act of parliament next referred to in the text. But the act itself is now rarely resorted to, and one case only appears in the books on the subject. It cannot, however, be considered as either obsolete or disused.

English and Roman law compared.

*Dower ex-
cepted.*

such *second* or *third* mortgagees *may* redeem any former mortgage. This act not to extend to bar any widow of any mortgager of her dower, who did not legally join with such husband in such mortgage, or otherwise lawfully exclude herself.

*Mortgagor to
give second
mortgagee no-
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tice of first
mortgage.*

On this statute it has been determined (*k*), that it is incumbent on the mortgagor, previous to a second mortgage of his lands, to give the second mortgagee notice, *in writing*, under his hand, of all prior incumbrances.

*Mortgage irre-
deemable in
mortgagor is so
in his assignee.*

That a mortgage, which on the statute becomes irredeemable (*l*), although assigned over to another in consideration of what is actually due thereon for principal, interest, and costs, still remains irredeemable in the hands of the assignee, who may take advantage of the statute against clandestine mortgages.

That, if a *subsequent* mortgagee redeem such foreclosing mortgage, he shall hold the estate irredeemable (*m*).

That if there are *more* lands in the second mortgage than in the first, that is a case omitted in the statute (*n*).

*An acre or two
no exception.*

That, the adding an acre or two would not exempt the case out of the statute, but would be considered as a contrivance to avoid it (*o*).

*This statute
does not cover
fraud.*

That a mortgagee, who claims the benefit of this statute, must have conducted himself fairly throughout the transaction (*p*); it being intended to recompence honest mortgagees for the trouble, hazard, and charge they may be put unto, and not to cover a fraud or ill practice in obtaining a mortgage, or an assignment thereof, or in becoming a purchaser.

(*k*) *Stafford et al. v. Selby*, 2 Vern.
589. S. C. 1 Eq. Ca. Abr. 320, pl. 5.
(*l*) Ibid.

(*m*) Ibid.
(*n*) Ibid.

(*o*) Ibid.
(*p*) Ibid.

It seems that a voluntary mortgage is not within this act of parliament. To bring a case within this statute, the latter security must be made for a valuable consideration, either originally credited to or afterwards permitted to continue upon the security of the lands mortgaged, otherwise it does not appear how the not disclosing of the former incumbrances could amount to the fraud, the prevention of which is the express object of this act of parliament. The letter and spirit of the act points at a charge for valuable consideration originally commuted for or entrusted to the security of the latter mortgage, and upon which the mortgagee relies.

Voluntary mortgage an exception.

CHAP. XII.

OF A DEVISE OF MORTGAGES.

Mortgage in fee devisable by will attested by three witnesses (A).

IT is clear, that a mortgage is such an interest or estate as is capable of being devised, and that any words in a will, clearly descriptive of the subject (such will being in the case of a mortgagee in fee, executed and attested so as to pass real estates), will carry as well the subject pledged, as the money secured thereby.

"All my mortgages" will pass the lands mortgaged.

Thus (a), where G., the father of the defendant, being seised in fee of lands, mortgaged them to K. and his heirs, with a proviso for redemption; and afterwards K., by his will in writing, gave all his goods, bills, bonds, *mortgages*, and specialties for monies to R. K., and made him his executor and died; the court were of opinion, that the words "*all my mortgages*" made a good devise of the lands mortgaged (B).

So will "securities for money." Semb.;

It may be presumed, that the words "securities for money" would have the same effect, for they are clearly descriptive of the subject, in its complex state of the pledge, and the money secured thereby (c).

(a) *Crips v. Grysil*, Cro. Car. 37. in *The Attorney-General v. Meyrick*, Trin. 2 Car. 2. [8 Vin. Abr. 202. S. P. ante, 139 a.—Ed.]

Proposition in Cruise's Digest questioned.

(A) As to the requisite attestation, see post, 458, *in notis*; and whether a mortgage is devisable before condition broken, see ante, p. 272, note (N).

(B) On this case, Mr. Cruise, in his Digest of the Law of Real Property, observes, (vol. vi. p. 252, without any cited authority,) "It was formerly held [alluding, perhaps, to *Crips v. Grysil*, *ubi supra*] that lands mortgaged might be devised by the mortgagee by the words '*all my mortgages*.' But afterwards the courts laid it down, that these words would only comprehend mortgages for years, and not mortgages in fee, especially if they were forfeited." The cases mentioned by Mr. Cruise, in the eight following sections of his work, do not support the latter limb of this proposition; and it is conceived no such rule now prevails. It is an arbitrary distinction, without reason or authority.

Operation of words "mortgages," and "securities."

(C) And even after the mortgage has ceased to exist, and the mortgagee is in possession of the estate as owner—the mortgage having been foreclosed, the words "mortgages," or "securities for money," will, it seems, without

And it seems clear, that if a mortgagee *particularly mentions* and describes lands mortgaged (*b*), so as that they are *ascertained* as objects of his devise, they will pass, and the devisee will be entitled thereby to a decree in Chancery against the mortgagor and his heirs, to pay the money or be foreclosed.

or other words
ascertaining the
lands.

And even if the land in mortgage be not precisely described, yet if the locality be pointed out, and a testator has no other landed interest, except mortgages, answering, in point of situation and circumstance the language used, they will pass.

Devise of free-
hold lands at C.
will pass mort-
gaged estate
there, if testa-
tor have no
other lands at C.

Thus (*c*), where A., mortgagee in fee of the Swan Inn at Chelsea, devised to B. and his heirs all his *freehold* messuages and garden grounds in Chelsea: It was held by Lord Hardwicke, on a question, whether the mortgaged interest would pass by this description, that, as it did not appear that the testator had any other land there, it *certainly* would (*d*).

(*b*) *How v. Vigures*, 1 Ch. Rep. 33. 457. S. C. 2 Eq. Ca. Abr. 606, pl. 41.

(*c*) *Clarke v. Abbot*, Barnard. Rep. [et infra, 447.—Ed.]

any additional words descriptive of real property, pass the legal estate to the devisee, if, from the whole will, a clear intention to pass the lands can be collected, and the will be properly executed and made or re-published after the foreclosure has been effected; for this see infra, 418, n. But in cases of this sort the concurrence of the heir at law, if it can be obtained, should always, for the sake of caution, be procured. The word "securities" will include *stock* or funded property. The general meaning of this word is explained in *Dicks v. Lambert*, 4 Ves. 730. et vide *Bescoby v. Puck*, 1 Sim. & Stu. 500. Mr. Coote considers it *verata questio* whether the legal estate of a mortgage in fee will pass by the word "mortgage," inclining however to Sir William Grant's opinion, that a gift of the money will carry the mortgagee's interest in the land if a clear intention so to pass it be manifest; and the learned gentleman submits that the word "mortgage" will certainly pass a mortgage term or other chattel interest. Coote Morg. 567.

(*D*) *Ut res magis valeat quam pereat*. This doctrine is founded on the rule laid down in the case of *Rose v. Bartlett*, Cro. Car. 202, which Lord Eldon, C. J., and the other Judges of C. B., in *Thompson v. Lawley*, 2 Bos. & Pul. 303. (S. C. 5 Ves. 476), considered to be a standing rule of property not to be shaken. Chambre, J. said, it was so fully established, that all the courts of justice were bound to conform to it; it had been considered as in force from the time of Charles the First, and had been recognised by the highest authority. It was there resolved (Cro. Car. 292), by all the justices, *absente*

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Foundation of
rule in text,
and reference to
confirmatory
cases.

"Possessed"
prevents lands
passing; mort-

But, where one seised of divers lands (d) in A., B., and C., in fee, the lands in C. being in him by mortgage, and for-

(d) *Wilkinson v. Merryland*, Cro. Car. 447. 449, 450. Trin. 11 Car. 2. S. C. Wm. Jones, 380. [and strongly approved by Lord Holt, in *Bridge-water v. Bolton*, 6 Mod. 106, cited also, 1 Rol. Abr. 834.—Ed.]

Richardson, that if a man have lands in fee-simple, and lands for years, and by will devise all his lands and tenements, the lands in fee-simple only, and not those for years, will pass to the devisee; *contra*, if the devisor have only lands on a lease or leases for years, and no property in fee-simple, for if the leasehold lands are not allowed to pass, they will have no effect, and be void. That this resolution has been acted on and acknowledged in similar cases, appears from *Day v. Trigg*, 1 P. Wms. 286. *Davis v. Gibbs*, 3 P. Wms. 26. S. C. Fitzg. 116. Mose. 269, and *Knotsford v. Gardiner*, 2 Atk. 450. But the construction, that where a man devises all his lands, the whole of his lands shall not pass but his freehold only, has been disapproved by modern judges, so that they have been ready to lay hold of any expression in the will to prevent the application of the rule, as laid down in *Rose v. Bartlett*, (ubi supra). It is however, a rule founded on intention, and therefore, the judges have, where they could collect that the testator meant that both freehold and leasehold lands should pass, determined in conformity to that intention. *Addis v. Clement*, 2 P. Wms. 456. *Lowther v. Cavendish*, Amb. 356. 1 Eden, 99. *Turner v. Husler*, 1 Bro. C. C. 78. *Lane v. Stanhope*, 6 T. R. 345.

So, in *Woodhouse v. Meredith*, 1 Meriv. 450, J. W. being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of H., and being in possession, as mortgagee of certain leasehold houses at K., in the county of M., but having no other property in the said county of M., and having other estates vested in him as mortgagee, besides those at K., made his will, devised all his freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K. to A. W. for life, and after her death, he gave all and singular other his freehold, copyhold, and leasehold messuages, &c. in the county of H. and M., or elsewhere, to E. W. and A. T., for their joint lives; and, after their several deceases he devised all the said freehold, leasehold, and copyhold messuages, lands, tenements, and hereditaments, unto and equally among their children, and gave to A. W. all the residue of his real estate not before disposed of, and all other his estate and interest whatsoever, vested in him as mortgagee or trustee, and all the residue of his personal estate, ready money and securities for money, subject to the payment of debts and legacies, it was held that the mortgaged premises at K. passed under the devise of all the freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K.

As to the effect of this doctrine in regard to devises of copyhold lands, and the supplying the want of a surrender in equity, vide *Doe v. Earl of Lucan*, 9 East, 418. *Blunt v. Clitherow*, 10 Ves. 589. *Church v. Mundy*, 12 Ves. 426. S. C. 15 Ves. 396. *Judd v. Pratt*, 13 Ves. 168. S. C.

feited (E), made his will; and, after devising the lands in A. and B. to several persons and their heirs, and several legacies to other persons, gave "*all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof he was possessed, to his wife, after his debts and legacies paid,*" and made her executrix, and died; whereupon she entered into the lands mortgaged, and devised them to M. and his heirs, and afterwards she died. On an *ejectione firmæ* brought by the heir of the mortgagee against the devisee of the wife, the sole question was, whether the fee in the mortgages passed to the wife by this devise? And the court were of opinion that *no* fee passed; for, that the heirs should not be disinherited, nor the fee passed away, without an apparent intent arising out of the words of the will. And, in this case, it did not appear that he intended to pass but such things whereof *he was possessed*, which extended only to things personal, or leases, and not to freeholds whereof he was said in law to be *seised*. And perhaps he was not possessed of this land; for it was not found that the mortgagee entered and was in possession, and commonly the mortgagor retained the possession until forfeiture.

gagsee in fee not being in possession.

In the same case (e) it was said, it would have been very doubtful whether even an estate for life had passed to the wife if she had been alive, because the mortgages were coupled with only personal things, *as goods, leases, estates, mortgages, debts, &c.* which might be intended only of estates for years; and so much the rather, by reason of the words "*whereof I am possessed.*"

"Mortgages" coupled with personal things will not pass fee (S. Q. & vide post, 411, 12.)

(e) Cro. Car. 450.

15 Ves. 390. *Sampson v. Sampson*, 2 Ves. & Bea. 337; and generally, see *Ithell v. Beane*, 1 Ves. 215. S. C. 1 Dick. 132. *Chapman v. Hart*, 1 Ves. 271. *Turner v. Husler*, and *Louther v. Carendish*, ubi supra. *Whitaker v. Ambler*, 1 Eden, 151. *Pistol v. Riccardson*, 2 P. Wms. 459, n. S. C. 1 Hen. Bla. 26, n. *Watkins v. Lea*, 6 Ves. 633, and *Biddulph v. Biddulph*, Arg^o. 12 Ves. 164.

(E) By a note of Parker, C. B. annexed to this case, it should appear that the mortgage was *not forfeited*, and so more particularly within the meaning of the term "mortgage," but the three judges Croke, Jones, and Lord Rolle, concur in treating the case as cited in the text, though the latter sentence of this paragraph seems to favor the Chief Baron's reading.

P. 409
continued,

Observations on
last case.

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And certainly, had the latter point been agitated during the life of the wife, and the devisor been possessed of mortgages for years, it would have been decided against her; because the question, as taken up by the court, was, whether these mortgages *in fee* were to be considered as *real* or *personal* estate? And the unanimous opinion was, that they were of the former description; in which case, the words of this will would not have attached upon them: besides, from the clause with the words, "*goods, chattels, leases, estates, mortgages, &c.*" it could not have been inferred that the testator had an intention of passing estates in fee simple, as the sentence, in which they were included, first took notice of an inferior kind of property; but the natural construction would have been, that the testator intended mortgages for years, which were of equal respectability, in consideration of law, with the leases and other property combined in the sweeping clause.

Construction
bad, if it render
will void.

The force of this reasoning, however, would have been in some degree weakened, if the testator had not been possessed of any mortgages for years; because, in that case, either the word "mortgages" in the will must have been totally rejected, which would have been repugnant to every principle of construction; or, he must have been understood to mean such mortgages as he had: and the rather in this particular case, because at this time the question, whether mortgages were to be considered as real or personal estate, turned upon nice and curious distinctions, in which few were conversant. And therefore, although if the testator had been possessed of such property as would have answered the words of the will, without expounding them to attach upon mortgages in fee, the court would have leaned to a construction which would not injure the heir at law: it being a maxim that *he shall not be disinherited but by express words or necessary implication*: Yet, if no operation could have been given to the words of the will, unless they had been held to affect the mortgages in fee, I should think, that the subject-matter being of so doubtful a nature, the intention would, in this case, have been strong enough to have outweighed the claim of the heir.

But now, the nature of mortgages being clearly understood, and the transaction (whether the mortgage be in fee, or for years, forfeited or not) until foreclosure, considered as a personal engagement only, in which the land is merely a pledge for the money, and remains in the mortgagor to every purpose (except that of securing the loan) it is apprehended, on the authority of *Crips v. Grysil*, the words, in the principal case, would receive a different construction, and carry all the testator's interest in mortgages, whether in fee or for term of years.

Last case questioned.—"Mortgages" will carry all testator's interest, whether in fee or for years. *Semb. (F).*

But it has been held, that general words in a will, descriptive of the testator's *real estate only*, as "all his lands," or all his lands, tenements, or hereditaments, shall not pass *lands* of which the testator was mortgagee in fee, where the words of the devise can be otherwise satisfied, and the *very disposition* and charges made by him, of or upon the lands comprised in the devise, are inapplicable to those which he held only in mortgage, and there is nothing that affords an inference that mortgaged *lands* were intended to pass. Thus where L. (f), being seised of several manors, of lands in H., of mortgages in fee which were forfeited, and of great personal estate, having no issue, made his will, and, after devising of part to his wife for life, and other legacies, gave "*all other his lands, tenements, and hereditaments*, out of settlement, to his nephew;" one question was, whether these forfeited mortgages passed by the will under the general words, "lands, tenements, and hereditaments?" And it was unanimously agreed by the Lord Chancellor [Cowper,] assisted by the Master of the Rolls, Lord Chief Justice Trevor, and Justice Tracy, that the mortgages in fee, although forfeited when the will was made, did not pass by these general words (g).

General words descriptive of real estate only, [412] will not pass mortgages, if those words can be otherwise satisfied.

(f) *Sir Litton Strode v. Lady Russell et al.* 2 Vern. 621. S. C. 2 Vent. 61, 62. 351. 3 Ch. Rep. 169. 3 P. Wms.

(F) This is good law, if the will be duly executed and a contrary or inconsistent intention does not appear on the face of the will, see *infra*, note to p. 423, 4.

(G) And that the words "out of settlement" were of no effect, 8 Vin. Abr. 279. This case of *Strode v. Russell*, was cited by the court in *Chester v. Ches-*

Case in text affirmed.

Devise of lands in A. or elsewhere, mortgage lands do not pass;

Again, where P. (g), seised of lands in the counties of F., M., and D., conveyed them to G. by way of mortgage, and

(g) *Wynne v. Littleton et al'*. 2 Ch. 351. S. C. Swinb. 504. *Et vide infra*, Rep. 51. S. C. 1 Vern. 3. S. C. 2 Vent. 416.

ter, 3 P. Wms. 55, as having been affirmed in the House of Lords, and as affording great authority for the decision in the principal case there. For the affirmation on appeal, see 1 Bro. P. C. 229. But it is observable, that the decree in *Strode v. Russell*, as stated in the Register's Book, takes no notice of any mortgages, except those whereof the testator had, after the making of his will, purchased the equity of redemption. Indeed, it appears from the bill and answers, that there was only one other mortgage out of settlement, which was of a copyhold estate, not surrendered to the use of the testator's will. Reg. Lib. B. 1707, fo. 510.

Cases where general descriptions held to pass legal estate though confined to "my estate,"

In *Marlow v. Smith*, 2 P. Wms. 198, it was held, that a devise by a mortgagee, of "all and every his real estates" to A. and his heirs, passed the legal estate in the mortgaged premises, *et vide* S. P. *Attorney-General v. Phillips*, 16th Nov. 1767. The reasoning in *Marlow v. Smith* was, that although the mortgagee is in equity considered merely as a trustee, yet the legal estate being in the devisor, in the eye of the law it is his estate and his property, and therefore passes by the devise of his estate, and if he had devised all the lands of which he had been seised, the lands in mortgage would certainly have passed. So it was said in *Sir Thomas Littleton's case*, 2 Vent. 851, that if a man have lands in fee, and other lands mortgaged to him in fee, by a devise of all his lands, the mortgaged lands will pass. A contrary line of argument was, however, adopted, in *Chester v. Chester*, ubi supra, but it was qualified to mean, that the general words "all my estate," should pass the lands in mortgage, if the testator had no other lands which would satisfy the devise. In *Chester v. Chester*, ubi supra, it was observed, by the Lord Chancellor King, and judges assistant, that an estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it, and the mortgagee's right is only to the money due upon the land, not to the land itself; for which reason, till the mortgage is foreclosed, it is not properly the mortgagee's land, nor will it pass as such by the devise of all his lands, if the testator have other lands to satisfy the words of the will.

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Legal effect of devise preferred to intention, contra nunc.

In the case of *Bowes Ex parte*, 26th July, 1744, a mortgagee in fee, devised all his lands, manors, farms, tenements, hereditaments, and real estate in S., K., and M., and elsewhere in England, to certain uses, which at the time of filing the bill vested an estate tail in an infant. This devise was held to include the mortgage in fee, and the money having been paid to the executor of the mortgagee, the infant was held to be a mere dry trustee, and as such was ordered to convey the legal estate to the mortgagor by recovery. In this case, it is clear, the testator could not have meant to create an estate tail in the legal estate of the mortgaged lands; and yet Lord Hardwicke thought the legal operation of the devise ought to hold against the intent. See, however, the note at the end of this chapter, where the intention of the testator now seems to be the leading criterion in judging, whether the mortgaged lands will, or will not, pass by the devise.

W. was party thereto, and covenanted to pay the money if P. failed, in which case G. was to convey to him, which on P.'s neglect was done. W. entered on the lands and enjoyed them several years; and being seised thereof, and also of other lands in other counties in Wales, (whereof part lay in the county of M., as part of the mortgaged lands did), but of no lands in F. and D., except those mortgaged, made his will, and thereby devised all his lands, tenements, and hereditaments, in the counties of A., M., and C., or in any or either of them; *or elsewhere*, within the dominion of Wales, to J.W., and his heirs, and devised *a rent-charge* of 80*l.* *issuing out of the same lands*: and, after the bequest of several great sums and legacies, bequeathed all the rest of his goods, chattels, and personal estate whatsoever (his debts, legacies, and funeral expences being first paid) unto his loving ———, whom he made sole executor of his last will, and left a blank unfilled up; the question was, whether the lands mortgaged should pass to J.W. by this devise, or whether the administratrix should have them? And it was decreed in favor of the administratrix for these reasons; first, that the testator made special mention of the three counties in which his own lands of inheritance laid, not of the counties in which the mortgaged lands laid, but only added the general clause, *currente calamo*, or *elsewhere* within the dominion of Wales; that, having first descended to particulars, he had thereby so limited and circumscribed his intention, that the general fortuitous clause could not open or enlarge it; for that was but in the nature of an *et cætera*, which might serve to fetch in small parcels of land, that were the testator's own inheritance, laying out of the three counties particularly mentioned (of which, in truth, there were some), but could never reach the mortgaged lands which were of a different nature; and the rather in this case, because they were of great value, equivalent to, if not exceeding, the value of his other lands, and therefore might not pass by such a general clause, as if only skirts and members of the other lands (H). Secondly, because the will had charged the

because particulars having been described "elsewhere," was like an &c.

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(H) The import of the technical term "elsewhere" was viewed in a very different light by Lord Chancellor King and Chief Justice Raymond, in the case of *Chester v. Chester*, 3 P. Wms. 61. They considered that word to be

Effect in will of term "elsewhere."

and because it could not be meant to charge redeemable lands with a rent.

lands that passed by the devise of *all his lands*, with a rent-charge for life, and no one could be thought so improvident as to grant a rent for life out of lands which were every day redeemable. But it was observed by the court, that it might have been otherwise; suppose the devise had been of all his lands in the said three counties, and then, without more, said, "that the *rest* of his personal estate should go to his executor;" for then, perhaps, the mortgaged lands would pass; as otherwise there would have been nothing to answer, or make sense of that clause, "*and the residue of his personal estate, &c.*:" for that would have implied that he had already devised some part of it, or at least evinced that he meant part of it should have passed: but, as this case was, these words were well understood, and they effectually answered without any such construction; for, before that clause in the will, the testator had devised divers legacies that in the whole did amount unto 1500*l.* (1).

the most significant, sensible, and comprehensive word that could be used, equivalent, in fact, to the naming of the lands; and they said it would be of the most dangerous consequence, under pretence of construing wills and assisting the intention of testators, to reject a word so material to be made use of, both for the sake of brevity and security. So in *Haues v. Cory*, Cro. Eliz. 159. *Cook v. Gerrard*, 1 Lev. 212. *Rook v. Rook*, Pre. Ch. 202. S. C. 2 Vern. 461. 1 Freem. 519. *Kinsman v. Kinsman*, 2 Vern. 559. *Willows v. Lydcott*, 2 Vent. 285. *Ridout v. Pain*, 3 Atk. 492. S. C. 1 Ves. 11. *Cole v. Rawlinson*, 1 Bro. P. C. 108. *Freeman v. Duke of Chandos*, Cowp. 360. 363. *Atkyns v. Atkyns*, ibid. 808. *Johnstone v. Baker*, 4 Madd. 474. and *Wynne v. Littleton*, next note. Vide tamen *Strong v. Trott*, 2 Burr. 912. S. C. 5 Bro. P. C. 496, which seems *contra*, but has since been denied. As to the effect of the word "elsewhere," in the case of lands not purchased at the time of making the will, vide *Guidot v. Guidot*, 3 Atk. 254; and further, *Roe v. Read*, 8 T. R. 118.

Doubt created by decree in *Wynne v. Littleton*.

(1) The decree in this case of *Wynne v. Littleton*, as taken from the Register's Book (B. 1680, fo. 452), tends materially to weaken the principle deduced from it in the text. The question was, whether by a devise of all the testator's lands, tenements, and hereditaments, in the counties of A., M., and C., or *elsewhere*, within the dominion of Wales, to Sir John Wynne in fee, subject to a rent-charge, included lands mortgaged to the testator? The mortgage, it is presumed, was in fee. By the Register's Book it appears to have been decreed that Lady Littleton, the administratrix, was entitled to the mortgage in question as part of the testator's personal estate; and the decree directed, that upon payment of the principal and interest by the mortgagor (who had brought a cross bill to redeem), the said Dame Anne Littleton, and the plaintiff Sir John Wynne, should convey and assure unto the said Mr. Prior the

Again (h), where one being mortgagee in fee of an estate, for securing 25,000*l.*, died, having first duly made his will, whereby he gave and bequeathed the said sum of 25,000*l.* and interest, due on the said mortgage, to his executors upon certain trusts: and he gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, and every part and parcel thereof (*subject to the payment of his debts, and to the payment of an annuity of 30*l.**) unto and to the use and behoof of his sister, her heirs and assigns for ever; and the question was, whether the legal estate, in the mortgaged premises, passed by the will? His Honor said he had no doubt about it, and adjudged that it did not pass (k). *Mortgage lands not passed if devise be for purposes to which estate is inapplicable.*

(h) *Duke of Leeds v. Munday*, 3 Ves. 348. [cited and acknowledged by Lord Eldon, 8 Ves. 433.—Ed.]

mortgagor, and his heirs, all his title, estate, and interest in and to the said mortgaged premises." Now as the decree directed Sir John Wynne to be a party in a re-conveyance, it is clear that he was supposed to have the legal estate in him, because the decree previously declared that he took no beneficial interest under the devise. The Register's Book does not mention whether he was the heir at law of the testator, but merely that he was the testator's near kinsman, whilst administration was granted to Lady Littleton as his next of kin. The decree therefore leaves it equivocal, whether the legal estate vested in Sir John Wynne as heir at law or as devisee. If as devisee, then a devise of lands, tenements, and hereditaments in A. or elsewhere, to B. in fee, will pass lands in mortgage. If as heir at law, it shews that the legal estate will not necessarily follow the beneficial interest, and pass as personal property to the executor or administrator, but will require certain words peculiarly adapted to the transfer of real property in order to pass it.

(K) The report from which this case is taken, is not correct in stating that the Master of the Rolls had no doubt upon the point. The trust of the mortgage money under the will was in favor of an infant; and the question was, whether the legal estate passed by the devise or descended? His Honor said his *idea* was, that it did not pass; and he made the order to prevent the party from being turned round on account of a doubt; but he took care to make it conditionally; declaring, that the infant was a trustee and mortgagee within the statute of Anne; and ordering her to convey so far as any legal estate in the mortgaged premises descended to her. See also *Sergison Ex parte*, 4 Ves. 147. S. C. post, 419. That case was in circumstances the same as the present, with the difference only, that the residuary devisee was executor, and the mortgage debt was specifically bequeathed. *Text corrected.*

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The reader will observe, that though the description used in the clause in question is as comprehensive as could well be imagined, and sufficient to include every species of property the testator was capable of devising, yet the purposes to which the estate devised was subjected, were perfectly incompatible with the nature of the interest the mortgagee had in the mortgaged premises, and the mortgage-money was not given to the residuary devisee (L).

Old mortgages. But in the case of the *Attorney-General v. Bowyer* (i), old mortgages were held to pass by will, as the testator's property (M).

What general words will pass land in mortgage.

The decisions in the cases of *Strode v. Russell*, and *Wynne v. Littleton* (k), may likewise be supported by another principle, that in truth lands in mortgage are not the testator's own lands in notion of equity, which, as we have seen, considers them only as pledges for money, and the testator's substantial and beneficial interest therein, not as real, but personal property; under which view it seems reasonable not to consider such lands as comprehended under the extent of general words, express-

(i) 3 Ves. 714. [et vide *Cholmondeley v. Clinton*, 2 Meriv. 173.—Ed.]

(k) Ante, 414 a, n. (I).

Intention preferred to legal operation of devise.

(L) The intention therefore of the testator is to be preferred to the legal operation of the devise; and we may take this to be a leading rule at the present day, that the court in all cases will presume, that the testator did not intend to devise the mortgaged estate on trusts which are inconsistent with the nature of his tenure.

Old mortgages held to pass as part of testator's property.

(M) In this case the testator by his will appointed that the trustees therein named should stand possessed of such manors, lands, and premises, wherein he was possessed of any estate *for any term or terms of years*, in trust from time to time to assign the same to such person or persons as should be entitled to the actual possession of his lands of inheritance by virtue of the limitations in his said will contained; and it was held by Lord Chancellor Loughborough, that several very old mortgages for terms of years, and also a mortgage in fee, should on account of length of time pass by the will, though the defendant by her answer stated that she did not believe there ever had been a release of the equity of redemption in any of the said mortgages; and Lord Loughborough also held, that there was not any equity between the heir or devisee, and the personal representative, to convert property from the state in which it is found at the death of the testator. S. C. on further directions, 5 Ves. 300.

ing a *disposition* of the testator's *real property*, without any *apparent* intent of including the personal. But these distinctions will not hold, it is apprehended, where the words and apparent intent of a testator expressly and clearly extend to his whole property; instances of which occur in practice: as if a testator, possessed of real and personal property of different kinds, and among the rest of mortgages in fee, were to devise "all his property, of every kind, and wheresoever being, that he should be possessed of, or any ways entitled to," &c.; or "all his real, leasehold, copyhold, and personal estate and effects, of what nature or kind soever the same may be," would it be possible to deny that the testator's estate or interest in any mortgaged lands passed by these words, without asserting that such *his* estate and interest in those lands was no part of any kind of property to which he was any wise entitled? Or, in other words, that the testator was not entitled to any kind of property at all in lands mortgaged to him? Whoever should assert this by way of taking mortgaged lands out of a devise, would, at the same time, preclude any descent to the heir; for if the testator had no sort of property at all in the lands, he had none to transmit to his heir. Therefore it is conceived that if a mortgagee has any property in the lands mortgaged, then, be it what it may, it will pass by words expressly disposing of his whole property, of whatever kind or description of title, if his will be executed as is required to pass such property (N).

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(N) In the construction of wills, there is but one general rule to be observed equally in courts of law and courts of equity. The *intention* of the testator is the first object to be discovered; that being ascertained, it must be carried into effect, however informally or ungrammatically expressed, or however numerous and cogent the arguments may be against the policy of the devise. The conception, therefore, of the learned author, as expressed in the last sentence of the text, cannot be admitted, if from the whole will, an intention to exclude the lands in mortgage from the general devise be apparent. The doctrine we are considering, has undergone some variation since the learned author wrote, which will be best perceived by a review of the subsequent cases; to a discussion of which we now proceed.

General rule in construction of wills.

In *Roe v. Read*, 8 T. R. 118, cited 11 East, 49, A. having an estate of his own in the county of B., and another in the county of C., and having also the legal, but no beneficial interest, in an estate in the county of D., with power of appointing it to either of his sons, by will, devised all his estates of

Dry legal estate of no use to pay debts, its not included in general devise.

General devise to executor implies that he is to have legal estate. Semb.

Another case which frequently occurs in practice, is, where a testator devises his real estates, and his personal property, or

what nature or kind soever in the county of B., and at Aderbolt, in the county of C., or elsewhere, in the kingdom of England, *after payment of his debts and legacies*, to a younger son. And it was held, that the trust estate in the county of D., did not pass by this general devise, because it could not be appropriated to the payment of debts and legacies, and because the testator having devised two estates of his own in the counties of B. and C. which the residuary clause enumerated by name in the following words: "or elsewhere in the kingdom of England;" could allude only to estates *ejusdem generis*, namely, to those which were his own also.

Legal estate not passed by general words without an intention to include it.

The residuary clause in the *Attorney-General v. Buller*, 5 Ves. 340. 1800, is conceived in the most general and verbose language that could well have been dictated, yet it is not without expressions affording grounds for argument against the decision which ensued. The words are, "and for the better raising and securing all and every the sum and sums of money aforesaid, and just payment thereof, as well as of my just debts and funeral expences, and for the due execution and performance of this my last will and testament, I do give, devise, and bequeath, all and singular, *my lordships*, and reputed lordships, manors, or reputed manors, capital and other messuages, bartons, farms, tithes, lands, tenements, annuities, rents, reversions, remainders, and hereditaments whatsoever, and all and every the parts and shares thereof, with their and every of their appurtenances, whereof and wherein, *I am in my own right*, or whereof or wherein, any other person or persons whomsoever, in trust for me, [*not, in me, in trust, for any other person or persons,*] or for my use, advantage, or benefit, is or are seised, possessed, or estated, or whereunto I, or such person or persons in trust for me, or to my use, is or are entitled, in or by law or equity, and all my right, estate, title, interest, term and terms of years, claim and demand whatsoever, both in law and equity, of, in, and unto the same, and every or any part or parcel thereof, unto my second and third sons, John Buller and Francis Buller, to have and to hold, all and singular the said premises unto the said John Buller and Francis Buller, and their heirs for ever; and all the rest and residue of my goods, chattels, rights, and credits, and all my real and personal estate not before hereby given, devised, or bequeathed, and all my right, property, and interest therein, in or by law or equity, I do hereby devise and bequeath unto my said second and third sons, and I do make, constitute, and appoint them my said sons, executors of this my last will and testament." To the Master's report, that the legal fee of premises, which were vested in the testator as trustee, passed to the devisees in fee, an exception was taken by the purchaser of the estate in question, who insisted that it descended to James Buller, the testator's eldest son, and heir at law. Mr. Mansfield, for the report, took the rule to be, that general words would not pass trust estates, unless there appeared to be an intention that they should pass. To which, Lord Rosslyn, Chancellor, assented, observing, that *that* certainly was the then understanding; but perhaps the most convenient

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Lord Rosslyn wished the reverse, as devisee more easily found than heir.

the residue thereof, in terms sufficiently comprehensive to include both, to one or more persons in trust for some given

rule would have been the reverse, as it might be more easy to find a devisee than an heir. The exception was over-ruled.

In another case, (*Brettel Ex parte*, 6 Ves. 577) language equally general, was considered as inadequate to the transmission of the estate in question to the devisee. The words were, "all the rest, residue, and remainder of my estate and effects whatsoever, and wheresoever, and of what nature or kind soever, I give and bequeath the same unto my natural son, George Hall, now a midshipman, belonging to my ship the *Canton*, his heirs, executors, administrators, and assigns, for ever, to and for his and their proper use and behoof." And it was held, by Lord Eldon, against the Master's opinion, that an estate in the testator as mortgagee in fee, did not pass to the natural son, the words in italics seeming to indicate a contrary intention. Besides, said Lord Eldon, the testator spoke of estates in trust for him, and said nothing about estates in him in trust for other persons. The inference from that was, that he did not intend to devise them. The discussion on this rule began with Sir Thomas Sewell, and Sir Thomas Sewell's idea was, that the word "my" would not refer to what did not beneficially belong to the testator. The will in question, Lord Eldon continued, contained the words "to and for his own proper use and behoof." Probably, the testator meant nothing by that, but a meaning must be attributed to every word. And his Lordship said, he rather thought there was not enough in the will before him to pass the mortgaged estate to the infant devisee, George Hall, who had taken the name of Brettel; and his Lordship therefore dismissed the petition.—This case was afterwards mentioned in *Braybrooke v. Inskipp*, ubi infra, and Lord Eldon there said, it came on upon a petition, and was not perhaps so attentively considered as the importance of the point required, but it was not his intention to say, that in the instance of a dry trust estate, with nothing more in the will than a mere devise in general terms, that he understood the rule to be, that it would not pass. This explanation makes a material alteration in the authority of *Brettel Ex parte*. It must now be considered as a case *sui generis*, and warping the rule neither the one way nor the other.

Empty legal estate of no benefit, it is not included in general devise.

General applicability of this rule questioned.

In the *Attorney-General v. Vigor*, 8 Ves. 276, 1803, the Lord Chancellor drew the line of distinction between the old and modern rule on this subject, and admitted the doctrine to be, that though in the old cases it was held, that a devise of all manors, lands, tenements, and hereditaments, generally, gave to the devisee those estates, of which the deviser was only mortgagee in fee, yet the modern rule was, that if the purpose to which the testator devotes the lands, is simply to A. and his heirs, it will not pass the mortgaged estates, clearly not, if they are devised to a variety of uses, to which it would be very inconvenient to devote property which is in the testator merely as mortgagee, as to a charity for instance, or other permanent purpose; and his Lordship held, that if the mortgage in fee, in the case before him, were an acknowledged mortgage, it was reasonably clear, that it would not then have passed by a devise of all other the testator's lands not in his will before disposed of to trustees and their heirs to raise portions, &c.; but in consideration that it

Whether legal estate shall pass is a question of intention.

purpose, as payment of debts or any other object, and makes

was an old mortgage, and the equity of redemption barred by length of time, it was the testator's own property, and, therefore, sufficiently designated by the above description.

Lord Eldon's
expression of
rule in *Bray-*
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broke v. In-
skipp.

The merits of the doctrine under consideration, were again fully investigated by Lord Eldon, in the case of *Braybroke v. Inskipp*, 8 Ves. 432. His Lordship there said, it was unseemly to leave the question undecided, as in *Sergison Ex parte*, (cited ante, 206, in *notis*,) where the money was directed to be paid into court, and the infant to convey when of age; for it was an important point, and highly expedient that some principle should be laid down respecting it, rather than bring such doubts on the record. The case was shortly this:—One Owen B. devised estates to Sir R. A. and E. S. and their heirs, upon trust to sell, to raise money to pay debts, and to settle the estates unsold to certain uses. Sir R. A., the surviving trustee, made his will, and thereby gave and devised all his real estates, whatsoever and wheresoever, unto his wife Dame Gertrude A., her heirs and assigns for ever. An objection being taken, that the legal estate in the lands remaining unsold and unsettled did not pass by this will, but descended to the heirs at law of Sir R. A., and two of his co-heirs being infants, and another a feme covert, an application was made under the statute of Anne (7 Anne, c. 19) for a reference to the Master, to inquire whether the infants were trustees within the act. The Master reported that the legal estate did not pass by the will, and that the infants were trustees within the act. A petition was then preferred to the Master of the Rolls, praying him to confirm the report, and to direct the infants to join in the conveyance. The Master of the Rolls declared his opinion to be, that the legal estate did pass by the will, and that the infants were not trustees within the act, and thereupon dismissed the petition. The opinion of the Chancellor was now sought, which Lord Eldon said, he gave with a good deal of hesitation and difficulty, on this consideration:—Either the legal estate was in Lady A. as devisee, or in two infants and a married woman, the heirs at law. The case, therefore, raised the question, whether the greater quantum of convenience was on the one side or the other. The case of *Sergison Ex parte*, (cited ante, 206, n.) left the question in very considerable doubt. Lord Alvanley's ground in that case was, not that he thought the mortgaged estate did not pass, but that the infant was not a dry naked trustee, as he had an interest in the money secured by the mortgage. Lord Rosslyn did not decide it, but the heir offering to join, directed him to join, and the money being the infant's, made a convenient arrangement, thinking it reasonable that the infant, when of age, should join. That case, therefore, was not a decision one way or the other. The distinction taken in the argument of the *Attorney-General v. Buller*, was stated without authority. The difficulty of acceding to the Lord Chancellor's assertion in that case was, that the recent authorities shewed plainly, that there was no settled understanding on the point, and the doubt and arrangement in that case shewed it. Lord Eldon continued to remark, that the quantum of convenience could only be estimated with regard to each will. Upon a limitation of real estate in strict settlement, with a vast number of limitations over, contingent remainders, executory devises, powers of

Sergison Ex parte, an indecisive authority.

No authority for rule in *Attorney-General v. Buller*.

such parties executors, and dies seised and possessed of mort-

jointuring, leasing, raising sums of money, &c. it was impossible to say, the intention could be to give a dry trust estate to such uses, for this question attached upon that, just as much as upon a mortgage. Yet, in the simple case of a testator having an heir at law, under circumstances, in which his execution could not be procured, as if he were abroad, or if the testator did not know him; or, as in this instance, if the heirs were two infants, and a feme covert, who must levy a fine, there the argument of convenience was all the other way, in comparison with the gift of a mere dry trust estate to an individual competent to do the acts, and at hand to do them as Lady A. was. The last case in the books on this point was *Brettel Ex parte*, and Lord Eldon certainly did not mean to be understood to put any thing, as he was then understood at the bar to have done, upon the expression, that it was given to the use and behoof of the party. His meaning was, that it was probable the testator did not mean, that a mere dry trust estate, not in a beneficial sense altogether his, should pass as his under general words, when, if it did, it was incapable of such a large species of enjoyment, as upon the whole will be intended to give in every part of the property devised. In the case before him, Lord Eldon was disposed to concur with the opinion of the Master of the Rolls, meaning rather to state his judgment, that the rule was not, that in every case where general words are used, the property shall or shall not pass, but that in each case, every part of the will must be looked to for the intention, with regard to such property. *He knew of no case which stated the rule to be, that trust estates should not pass under general words unless an intention that they should pass appeared, and he inclined to think they would pass, unless it could be collected from expressions in the will, or purposes, or objects of the testator, that he did not mean they should pass.* In the case in question, there was but one circumstance denoting any special intention. It was the case of a dry trust, all the debts and legacies being long paid. There was, therefore, a pure legal estate in this testator, nothing remaining to be done but to re-convey, and he was not aware of any case, in which a mere devise, in these general terms, without more, where the question of intention could not be embarrassed by any reasoning upon the purposes or objects, or the person of the devisee, had been held not to pass the trust estate. If there was any such case he would abide by it, but he did not feel strong enough, upon authority or reasoning, to dissent from the decision of the Master of the Rolls. Lady A., the devisee, had, therefore, in her, the legal estate. Immediately after Lord Eldon had pronounced his judgment, Mr. Bell, who was counsel in the cause, observed, that Lord Hardwicke's opinion in *Casborne v. Scarfe*, (ante, 287) was clear, that a mortgage in fee not foreclosed, would not pass by a general devise. The Lord Chancellor said, he did not believe Lord Hardwicke said so, and would look at his notes. On a subsequent day he observed, that upon the best consideration he could give this point, his opinion was, that the trust estate did pass, and he must overturn *Roe v. Reads*, if he should say otherwise.

Brettel Ex parte explained.

Every part of will must be [420] looked to for intention.

If that not embarrassed, legal estate will pass.

The rule, that the legal estate of a mortgage in fee will not pass by a general devise, if any inconsistency or absurdity arise in the supposition of its being included, was still further confirmed by the case of *Morgan Ex parte*, *Legal estate not included in general devise which is charged with annuity.*

gages in fee, and other real estates, in which he has an absolute

Legal estate cannot pass if testator is unconscious it has fallen on him.

10 Ves. 101. There, J.W., a mortgagee in fee, by his will, dated 25th June, 1714, devised as follows: "I give and devise, all and singular my messuages, lands, hereditaments, and premises, and all my real estate, of what nature, kind, or quality soever, and wheresoever the same are situate and being, unto my niece A.W., to hold to her the said A.W., her heirs and assigns for ever; subject nevertheless, and charged with the payment of one clear annuity of 20*l.*, to be issuing out of all and singular my said real estates, and payable to my said brother for his natural life." From the circumstance of every thing being charged with an annual outgoing of 20*l.* it was argued, that this rent-charge might have lasted longer than the mortgage, and thence it was collected and admitted by the Chancellor, that there was inconsistency enough to shew, that the testator did not mean to include the estate he held in mortgage in the general devise, but that the same descended to his heir at law. The will of C.W., the heir at law, was then referred to, (being stated in the original bill,) whereby he gave and bequeathed unto certain trustees, their heirs and assigns for ever, all such real estates as were then vested in him by way of mortgage, the better to enable them his said trustees and the survivor of them, and the executors and administrators of such survivor, to recover, get in, and receive the principal monies and interest which might be due thereon, and appointed the trustees his executors. Sir Samuel Romilly argued, that the object of this devise was to enable the trustees to recover and get in the principal and interest of the money due upon the estates of which he was mortgagee; clearly his intention was, not to devise the estate which had fallen upon him, probably without his being conscious of it. Lord Eldon, seeming to coincide with this argument, observed, that the reasonable construction of this will was, that the deviser gave his mortgages to the two persons who were his executors, in order that they might use their title under his will, to get in the money, which, by virtue of that will, they were to distribute as executors: and, therefore, his Lordship was of opinion, that the estate descended to the heir at law of C.W., who being an infant, (the mortgage money having been paid off,) was ordered to convey under the statute of Anne.

Instance where general devise held to include legal estate.

The remaining case on this point (with the exception of *Silberchilde v. Schiott*, cited post, 425, n.) is that of *Whiteacre Ex parte*, in *re Vallis*, an infant, at the Rolls, 22d July, 1807, stated by Mr. Sanders, in his *Trea. on U. & T.* vol. i. p. 285, 3d edit. n. (w). There a mortgagee in fee devised "all the rest and residue of his lands and hereditaments, and goods, chattels, mortgages, monies, and securities for money, and all other his real and personal estate not thereinbefore disposed of, unto his nephews S. R., I. R., and S.V., and to his grand nephew S. W. to be equally divided between and amongst them as tenants in common, and to their respective heirs, executors, and administrators, according to the nature of their respective estates," and the testator appointed the said four devisees executors of his will; S.V., one of the devisees, died, leaving an infant heir at law; and it was referred to the Master, to inquire whether the heir was a trustee or mortgagee within the 7th of Anne. The Master reported, that as the words in the residuary clause appeared to him to be sufficiently comprehensive to include the legal estate in the mortgaged pre-

and entire interest, and of money and other personal property.

mises, he conceived, that the freehold and inheritance of the said mortgaged premises, passed by the will of the mortgagee to the said S. R., J. R., S. V., and S. W., as tenants in common; and he was of opinion, that the said S. V. was an infant mortgagee of one fourth part of the mortgaged premises. The Master's report was confirmed, and the infant was directed to convey pursuant to the act.

The result of the whole is, that by a devise of "lands, tenements, and hereditaments," the legal estate of mortgages in fee, will not pass to the devisee, if there be other lands, tenements, and hereditaments, to supply the devise; except, indeed, the equity of redemption be foreclosed, purchased in, or barred by length of time, before the date of the will; for then the deviser will have lost his character of mortgagee, and have become the absolute owner; and, consequently, the lands which he once held in mortgage will, after the equity of redemption is destroyed, be as much his as any other parts of his property, and may be well devised by general words descriptive of his own property only, and *that*, though there be annexed language, which imports that he still holds the lands in mortgage, or as it should seem from the case cited post, 424, n., though there be a bequest of the money only due on the mortgage. Et vide S. L. in *Attorney-General v. Meyrick*, ante, 140. If, however, the testator have no other "lands, tenements, and hereditaments," than those in mortgage, the legal estate of mortgages in fee will then pass to the devisee; while, on the other hand, if the mortgage be foreclosed, or the equity of redemption released, or barred, after the mortgagee has made his will, the words "lands, tenements, and hereditaments," will not comprehend the new estate thus acquired. There must, in that case, be either a codicil or a republication to include the lands, so newly acquired, in the will, 2 Vern. 625. But if the equity of redemption be not foreclosed, purchased in, or barred by length of time, then a devise by a mortgagee in fee of "all the real estates of which he is seised" to A. and his heirs generally, will pass the legal estate to the devisee. But if the general devise to A. be upon trusts, or for purposes, or under limitations, which are inconsistent with the supposition, that the mortgaged estate was meant to be included in the devise, it will be presumed, that the legal estate in those lands was not intended to pass, and the devise will accordingly be held, not to include the property in mortgage, as if the devise be of all the mortgagee's real estates to A. in trust to sell, or to A. for life, with remainder to his first and other sons successively in tail, or to A. and his heirs, charged with the payment of the testator's debts and legacies, or the like, the legal estate will not pass; for as in these cases, the mortgagee could not equitably bind the estate with limitations, or subject it to equitable interests of this kind, courts of equity will presume, that he did not intend to devise the mortgaged estate for such purposes. To prevent the occurrence of questions of this sort, it is always advisable to insert in wills, an express devise of estates held by the testator in mortgage, with a declaration for what purpose they are so devised. A form of this clause will be added in the Third Volume.

It may not be without its use to remark here, that with respect to the debt due on mortgage, the more eligible plan is to make the specific legatee executor *Legatee of mortgage mo-*

It is apprehended, that in such cases the mortgages in fee, that is, the testator's whole estate and interest in the mortgaged

ney should be executor as to that debt.

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Legatee cannot take advantage of covenant for payment of money.

as to that debt ; for otherwise on the legatee's instituting a suit at law to recover the same, a letter of attorney from the executor will be necessary, to enable the legatee to sue in the executor's name, see Wood. Ins. 330 ; and though there be a covenant in the mortgage deed with the mortgagee, his executors, administrators, and assigns, yet if the testator bequeath only the sum due on the mortgage, an action for it cannot be maintained by the legatee ; for the covenant for payment of the money is a personal covenant, of which the executor alone can take advantage. This was decided in the recent case of *Canham v. Rust*, 2 J. B. Moore, 164. S. C. 8 Taunt. 227, where a mortgagee for a term of 1000 years made his will, and thereby, after reciting the indenture of mortgage, gave and bequeathed to the plaintiff the sum of money due and owing to him (the said testator) from the defendant, who was the mortgagor, by virtue of the proviso contained in the said indenture, and appointed one W. Canham and the plaintiff executors. John Canham, the legatee and plaintiff, brought an action in his own name against the defendant for the money due on the mortgage, after having obtained an express assent to the bequest by his co-executor, which was fully proved. The day appointed for payment of the money in the mortgage proviso, had elapsed without payment, in the testator's life-time. The court of Common Pleas was of opinion, that the plaintiff had no cause of action : the only question was, whether he could avail himself under the circumstances disclosed by his declaration. This depended entirely on the construction of the covenant made between the defendant and the testator. It was quite clear that a personal covenant could not be assigned. It had been urged, that as the testator died possessed of the remainder of a mortgage term of 1000 years, that the plaintiff might sue as his assignee ; but the court thought there was no ground for saying he could do so ; for on his death the remainder of the term vested in the plaintiff and his co-executor. The sum only, which was due to the testator from the defendant on the mortgage deed, was bequeathed by the former to the plaintiff, no other interest being transferred. This therefore was merely a personal covenant, of which the executors alone could take advantage. The *Anonymous case* in Godbolt, p. 140, was particularly applicable to shew that this was a collateral covenant. It had also been well observed, that the covenant was broken in the life-time of the testator ; and the case of *Lewes v. Ridge*, Cro. Eliz. 833, determined that an assignee could not maintain an action on a breach of covenant before his own time. The court was therefore of opinion, that this action ought to have been brought in the name of both executors, by whom alone it could have been maintained.

Assignee can take advantage of covenant for breaches in his own time only.

Devise of mortgages for years.

As to mortgages for years, it may be remarked, that if the money only be given to the legatee, then over and beyond the executors' assent to the legacy, an assignment of the legal estate of the mortgage term should be procured from the executor, to complete the title of the legatee. But if the testator make a specific bequest of the term to the person to whom he bequeaths the mortgage debt, then the assent of the executor to the whole bequest will be

lands, as well as the money secured thereby, would pass; for such a devise to persons constituted executors, who, without it, would be entitled to receive the money due on the mortgages, and apply it as directed, implies the intent of investing the devise with the legal estate in the securities, as expedient for,

sufficient. The legatee can then recover his money in equity. In transferring or paying off the mortgage, it will be always prudent, especially in recent transactions, to make the executor an assigning party, not only for the purpose of recording his assent to the bequest, but also to embrace any legal estate which doubts may suggest is remaining in him through the supposed inefficient language of the will.

In the close of this note it may not be amiss to notice, that general words in an English will will not pass a mortgage of lands in Scotland; and though the will direct the Scotch mortgage to be taken as personal property, yet that direction will not be of any avail. In *Johnstone v. Baker*, 4 Madd. Rep. 474, n. (a), C. J. being entitled to a moiety of 25,000*l.*, secured by an heritable bond of certain lands in Scotland, being in fact a Scotch mortgage, by his will dated 10th April, 1811, gave and bequeathed unto trustees, their heirs, executors, and administrators, all and singular his real and personal estates, of what kind soever in Great Britain, America, or elsewhere, upon the trusts therein mentioned. And the testator by his will directed, that all his property and securities for money in Scotland should be considered as personal estate, and pass to his trustees, as far as he could by his will affect the same, as if the same had been his personal estate in England; and that all his estate and interest therein, of what nature or kind soever, should pass to and vest in his said trustees, their heirs, executors, administrators, and assigns. The Lord Advocate of Scotland, to whom the matter was referred by the Master of the Rolls, stated his opinion to be, that the will was ineffectual for conveying the heritable debt in question; but that the same did, on the death of the said testator, legally descend to his eldest son and heir at law. And Sir W. Grant, M. R. decreed accordingly. In another case, (*Buccleugh v. Hoare*, 4 Madd. Rep. 467) heritable bonds (together with English bonds and mortgages, by way of collateral security) were given on a loan of money to a domiciled Englishman, who made his will, disposing of his property in general terms. It was held, that this will effectually passed the money due on such securities; and that the heir at law of the testator had no claim in respect of the heritable bonds. The Vice-Chancellor, Sir John Leach, observing, that in *Johnstone v. Baker* the heritable bond was the only security given, and could not pass by the English will. Where however there were several securities for the same debt, an assignment or gift by the creditor of one security was an assignment or gift of the debt; and neither the creditor nor his representatives would be permitted to set up the other securities for the purpose of defeating that assignment or gift. It followed, therefore, that as to the securities not given by the will, the heir of the testator was a trustee for the legatee.

Scotch mortgage not devisable by English will. It descends to heir at law of mortgagee.

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But English mortgage being given as collateral security, general words effectual, and heir a trustee as to Scotch mortgage.

and subservient to, the execution of the trusts of the executorship (l) (o).

After decree of foreclosure nisi, "My freehold lands," will pass mortgages in fee.

But after a decree for foreclosure *nisi* (l), and *à fortiori*, after such decree is made absolute, mortgaged estates will pass by words in a subsequent will applicable to a devise of real property. G. being indebted to H., his brother, 640*l.* (m), devised to him a mortgage of 693*l.*, of which he had gotten a decree of foreclosure, but before the account was taken, or the mortgagor absolutely foreclosed, in these words, "And to my brother and his heirs, my other freehold estate in Feversham." *Et per curiam*, the lands in mortgage, being devised as real estate, shall be considered as such between the deviser and devisee (p).

(l) *Vide Ex parte Sergison*, 4 Ves. 147.

(ll) [That is, after a decree, declaring that the mortgagor shall stand foreclosed, (*nisi*) unless he shews cause

to the contrary on or before a day appointed by the court; and before the arrival of that day.—*Ed.*]

(m) *Garret v. Evers*, Mosely, 364.

Concurrence of heir advised.

(O) In a case of this kind, the concurrence of the heir at law, if it can be obtained, should never be dispensed with; and, in doubtful cases, it may be laid down as a general rule, that a conveyance should be taken from both the devisee and heir, in order that the purchaser may have a title *quacunque via data*.

Lands will pass by general devise after foreclosure, if so intended, though treated as in mortgage.

(P) When a mortgage has been foreclosed, or the equity of redemption released to the mortgagee, his title relates no longer to the money but to the land. The estate becomes vested in the mortgagee absolutely; and though he may, through mistake, continue to treat the property as still in mortgage, yet the equity of redemption will not be revived; and if an intention to include the lands in the devise can be clearly collected from the language of the will, the lands will pass, provided the will be executed for the devise of real estate, and be made or republished after the decree of foreclosure has been pronounced. A modern case has carried this doctrine to a considerable length. By a will dated 15th of March, 1798, and attested by three witnesses, the testator (having in 1795 obtained a decree of foreclosure of a mortgage made to him in fee of estates in Lancashire) made the following disposition:— "I now proceed to will and bequeath *all* the property I may die possessed of, after paying my legal debts and funeral expences, as follows (*viz.* I will and bequeath to Harriet my wife, for her natural life, the interest or proceeds of certain farms in the county of Lancaster, mortgaged to me for 2500*l.*, the documents whereof are now in the possession of A. B.; and I hereby declare it to be my will that the bequests aforesaid shall, after the decease of my said wife, be disposed of in manner following; to my daughter Harriet, one-third

If a devise be made of lands mortgaged (n), no decree

*After devise,
heir not a ne-
cessary party
to suits.*

(n) *How v. Vignres*, 1 Ch. Rep. 33, ante, p. 409.

part of my property in the English funds; item, *one-third part of the sum of 2500l. principal money, disposed of in mortgage of farms as aforesaid;*" and the remaining two-thirds to other children. Upon a question from the court it was admitted, that the subject of the bequest was only the sum of 2500l., subject to which the estate descended to the heir. The will had not been proved; but the Master of the Rolls said, he would give his judgment, *supposing it duly executed*. On a subsequent day his Honor remarked, *that if the will were properly executed*, he was of opinion the lands in question passed by it. The mortgage which the testator had originally upon the estate being foreclosed, the estate became absolutely his; and in strictness, at the date of the will, there was no estate mortgaged to him, nor any money due to him on mortgage. The mortgage being extinct, the land was his own. The testator seemed, however, not to have very well understood the effect of a foreclosure, and still continued to describe as a mortgage the interest he had.

If his interest had been really such, the Master of the Rolls continued, there was no doubt but that *a gift of the money would have carried his interest in the land upon which it was secured*. [As to this, see ante, p. 267, n. (L).] The question was, what he meant to comprehend in the description; whether only the money originally lent on mortgage, or all the interest, which at the date of the will he had in him, and which had been acquired in consequence of that mortgage. The will was throughout very inaccurate. The devise of a life interest to his wife was expressed in one way; that of the remainder to the children in another. The first seemed to import the interest in the land; the other the interest in the money; yet it was evident that in both instances he meant to speak of precisely the same subject. The devise to his wife was thus expressed, "Item, for her natural life the interest or proceeds of certain farms in the county of Lancaster, mortgaged to me for 2500l." That undoubtedly gave her a right to the produce of those farms; she became tenant for life by the devise. Afterwards he stated his intention, that the children should enjoy after her decease, apportioning among them all the bequests aforesaid; but in that apportionment he changed the phraseology: instead of giving as he had given to his wife the farms mortgaged to him, he gave "the sum of 2500l. principal money, disposed of in mortgage of farms as aforesaid." This seemed to his Honor not to have been a difference of intention, but to proceed from the general inaccuracy apparent throughout the will, and that sort of doubt which appeared to have pervaded his mind with regard to the nature of his interest in the subject; speaking of it sometimes as money, sometimes as land, sometimes of the farms as representing the money, sometimes of the money as representing the farms. The question was, whether he meant to separate the money from the land, or to give all his interest, whether land or money, to the same person. The latter was Sir W. Grant's opinion; for it was *one* bequest; and by *that* an entire disposition of the property; the testator never intending to give the money as a charge on the land, and to leave the land undisposed of, as it would be if his intention was not

Bequest of money held to carry interest in land under circumstances.
S. L. ante, 140.

Though mortgage foreclosed.

to redeem, or be foreclosed, can be made against the heir

by these devises to give *all* the interest he had in the lands. Consequently, *if the will was duly executed*, Sir W. Grant held, that *all* the testator's interest, in the lands in question, passed to his three daughters the devisees. *Silberschildt v. Schiott*, 3 Ves. & Bea. 49.

Last and next case distinguished.

In the preceding case, the decree of foreclosure was made three years previously to the date of the will. If it had been made subsequently to the will, and the will had not been republished, a different decision would have ensued; as in the following case, before Sir John Leach, Vice-Chancellor, involving precisely the same circumstances as that of *Silberschildt v. Schiott*, *ubi supra*, excepting that the will was made nearly two years before the final decree of foreclosure. An ingenious line of argument was pursued in the case before the Vice-Chancellor, in analogy to the technical doctrine of relation at law, but it did not prevail. Sir W. Grant's decision in *Silberschildt v. Schiott* was wholly overlooked; not however that it was absolutely necessary to have been cited, yet it bore materially on the point before the court, which was to the following effect:—

After foreclosure estate not devisable as a mortgage unless will be republished.

A testator being in possession, as mortgagee, of two estates in the island of Jamaica, called *Brampton* and *Bryan*, filed a bill in the English court of Chancery against the mortgagors, for a foreclosure of the mortgage. By a decree dated 6th July, 1805, it was ordered, that the Master should take an account of the principal, interest, and costs; and that upon payment of the same by the mortgagors on a day to be named by the Master, the mortgagee should re-convey, &c.; or in default the mortgagors should be foreclosed. The Master named the 31st January, 1807, for the payment of the money, which not being then paid, a final decree, dated 5th February, 1807, was made, declaring the mortgage foreclosed, and the mortgagors absolutely debarred of all right, title, interest, and equity of redemption, of, in, and to the said mortgaged premises accordingly. The testator, by his will dated 14th December, 1805, devised to certain trustees therein mentioned, all his plantation, lands, and tenements, whether freehold or leasehold, situate in the island of Jamaica, and all other his real estate and chattels real in the said island, to hold the same unto and to the use of the said trustees, their heirs, &c. upon the trusts thereafter mentioned. And the said testator devised to his said trustees, their heirs, &c. all the estates, which at the time of his decease should be vested in him upon any trusts, or by way of mortgage, of which he had power to dispose by that his will, upon the trusts, and subject to the equity of redemption, which at the time of his decease should be subsisting or capable of taking effect therein respectively; but the money to be secured on such mortgages he directed to be considered and taken as part of his personal estate. The testator died in March, 1807, on his passage to England. The question arising on this will was, whether the estates which the testator held as mortgagee, at the date of his will, but which he had foreclosed, as above stated, before his death, passed by his will, or descended to his heir at law. In support of the devise it was contended, that the final order of foreclosure related back to the decree *nisi*, and had the effect of vesting the estate from the time of the decree *nisi*; and that *Selwyn v. Selwyn*,

of the devisor, but only against the mortgagor and his heirs (q).

3 Burr. 1131, was analogous, where it was held, in the case of a common recovery, that the judgment had relation to the return. On the other hand it was argued, that the foreclosure did not operate from the time of the first decree; that decree being merely interlocutory and prospective, depending upon the condition of payment or non-payment of the mortgage money; for the foreclosure was open until the 31st January, 1807, the period fixed by the Master for the payment of the mortgage money, and until default of payment at that time, and the final order on the 5th February, 1807, the testator was mortgagee only. Upon that order the foreclosure took place, and the testator acquired a new estate, which he had not at the date of his will; and that the testator's heir at law therefore took the estate, the will not having been re-published. The Vice-Chancellor was of the same opinion. His Honor said, there was neither authority or principle for stating that the order of foreclosure related back to the decree for the account. At the date of the will the Brampton and Bryan estates were mortgages, and could not pass by the general devise of all lands in strict settlement, because the testator having no power to fetter these estates with a strict settlement, it was not to be intended that he meant to do it. A testator might, if he pleased, give by his will all his interest in mortgages to which he might be entitled at the time of his death, because a mortgage was in substance a chattel interest. At the time of the testator's death, in the present case, the Brampton and Bryan estates were not mortgages for chattel interests; they had become the fee-simple estates of the testator, by the order of foreclosure of the 5th February, 1807, and could not pass by any antecedent will. *Thompson v. Grant*, 4 Madd. Rep. 438. It may be proper to add, that a conveyance of the equity of redemption to the mortgagee operates as a foreclosure with reference to a will made prior to the conveyance. If, therefore, A. makes a mortgage to B. in fee in 1808, and in 1810 B. by will devises all his lands, &c. in such general terms as to include the money due on the mortgage and the legal estate also, and then in 1812 purchases the equity of redemption, and dies in 1815, without re-publishing his will, it is clear the legal estate will devolve on his heir at law, and not on his devisee. See also Patch, Mortg. 140, and Coote, Mortg. 588, who states a deduction from this position less succinctly and perspicuously than is usual with him.

Foreclosure not to relate back to decree to account.

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After conveyance of equity of redemption will must be re-published.

(Q) There is some obscurity in this passage. The principle to be collected from the case quoted is, that if the devisee of a mortgage of a dry reversion prefer his bill against the heir of the mortgagor to foreclose, it will be decreed that the heir of the mortgagor shall pay the mortgage money with damages, or the lands will be decreed to the plaintiff to be sold for satisfaction of his debt. As to the necessary parties to bills to redeem, see ante, 269 and 403; and as to bills for foreclosure, post, Ch. XXI. "Foreclosure." In the Index to the 4th edition, title "Decree," are the following words: "Decree to redeem or be foreclosed, not made against the heir of a devisor of lands mortgaged, but only against the mortgagor and his heirs, 557." This is a more perspicuous reading than the paragraph in the text, but the page referred to contains no such point. The figures 557 were probably a mistake for 452.

Mortgage of reversion, heir must pay money, or be foreclosed.

between two and three years after the making of the statute of frauds) whether, if a mortgagee had devised the mortgaged lands by will in writing, but not attested according to that statute (and the will had been proved in the Ecclesiastical Court) the devisee or the executor should have the land or money, when *clearly* the devisor meant the executor should not have it? The answer to which question seems to me, to depend upon the solution of another, namely, whether a devise by a mortgagee of lands, mortgaged to him, be within the fifth section of the statute of frauds (*r*)? For if it be the intention of the devisor, however strongly expressed, will not affect the property devised, or interrupt it in its course from the testator to those, to whom, by the designation of the law, it would have passed, had no such will been made or intention expressed: unless the circumstances required thereby (among which is that of being signed by the party devising, or some other in his presence and by his direction, and subscribed in his presence by three or more witnesses), had been actually complied with.

No express authority for this.

I have not, in the course of my researches upon this subject, met with any case expressly determined upon this point; the reason of which I apprehend to be, that it has been universally held to be out of the statute, the words of which are, that "all devises of *lands and tenements* shall be in writing," &c. (*s*): which words, being confined to real property only, clearly exclude mortgages. For, as the words *lands, tenements, and hereditaments*, in a devise, have been determined not to include mortgages (*t*), if there was any other subject in the will upon which they would operate, because those words are applicable to real property: so, they must be held to exclude mortgages, when made use of in a statute; the intent of which is, to restrain the disposition of real property by devise, unless the circumstances thereby required, are complied with.

(*r*) *Edlestone v. Streaks*, 1 Show. 89. Carth. 79. 81. 3 Mod. 260. *Lee v. Libb*, 1 Show. 68. 88. Carth. 35.— [These cases are not much in point. —Ed.]

(*s*) 2 Burr. 978. [ante, 144, in notis. —Ed.]

(*t*) *Strode v. Russell*, supra, 412. [Et vide S. P. in *Casborne v. Scarfe*, ante, 287, 8.—Ed.]

And, although I have found no case expressly determined upon this particular point, yet it is a conclusion necessarily resulting from the second resolution of the court in the last-mentioned case, viz. that although the testator, after making his will, foreclosed the mortgages (u), or obtained a release of the equity of redemption, yet they would not pass by the words *lands, tenements, and hereditaments*, contained therein, but would go to the heir at law; the reason of which resolution is plainly, that they are in the nature of new purchases, which the testator had not, at the time of the making his will: and, therefore, by law, could not pass thereby, however strong the intention of the testator might be, that they should (T).

Mortgage on foreclosure considered as a new purchase.

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(u) *Strode v. Russell*, supra, 412. [Et vide S. P. in *Casborne v. Scarfe*, ante, 217, 8.—Ed.]

(T) The books present us with conflicting statements on this doctrine. Thus, in the preceding page, the learned author submits it as his opinion, that mortgages are not within that section of the statute of frauds, which requires all devises of *lands and tenements* to be in writing, and “attested by three or four witnesses at the least;” for that mortgages have been universally held to be out of the statute. On the contrary, Mr. Cruise remarks, in the 6th vol. of his Digest, p. 87, that an estate in mortgage, though only held as a pledge for securing the re-payment of money borrowed, can only be devised by a will executed according to the statute of frauds; and that the same rule applies to an equity of redemption, which is considered as real estate, and similar to a trust.

Books at variance.

The distinction seems to be this:—In equitable construction, mortgages are not within the fifth section of the statute of frauds; for the interest of the mortgagee being regarded in courts of equity as entirely personal, although the mortgage be in fee, a will unattested is there considered as capable of passing the beneficial right to the land. On the other hand, courts of law make no distinction between legal and equitable or beneficial interests, but view the person who has the legal estate as entitled to the land. Consequently, if the mortgaged estate be supposed to pass to the devisee, the testator will then have devised, “*lands and tenements*” by his will, which must therefore, to make it available in a court of law, be attested by three or four witnesses according to the requisitions of the statute. In equitable contemplation, the estate in the land remains in the mortgagor; while in respect to the interest of the mortgagee, the land takes the character of personalty, as following the nature of the debt to which it is a collateral security; so that, as it is said above, if a mortgagee, after making his will, foreclose the mortgage or obtain a release of the equity of redemption, the mortgaged lands will not pass inclusively under the general words “*lands, tenements, and hereditaments*,” contained in the will, but will go as an acquisition or purchase acquired sub-

Devise of mortgage in equity and at law distinguished.

sequently to the will, to the testator's heir at law. Vide, in addition to the cases lastly cited in the text for this position, *Casborne v. Scarfe*, 1 Atk. 605.

Devise of mortgage, in equity without, at law within, statute of Frauds.

In consideration of equity, therefore, mortgages do not seem, as it regards the beneficial interest, to be within the words "*lands and tenements*;" nor as a general rule, we have seen, will such interests pass by a devise of lands, tenements, and hereditaments. If a mortgagee by his will expressly devise the mortgaged lands, or make a general devise of his lands, having only mortgaged lands, it should seem that the interest in the money will be thereby carried to the devisee; and the right in equity to the lands, whatever that right may be, will as a pledge accompany the bequest of the money, although the will may not be attested by any witnesses. But the legal estate will, it is conceived, descend to the heir at law of the testator, for want of a due execution of the will. The devisee may, however, use the name of the heir in a court of law or equity, to compel payment of the money or make the pledged estate his own by foreclosure; thus, converting the heir into a more trustee, from whom the legal estate can be procured at any time by bill in equity. See the observations of the Master of the Rolls, in *Attorney-General v. Meyrick*, quoted in the text, ante, p. 140, where the distinction above alluded to is accurately defined.

Heir at law trustee for devisee.

Whether lands will pass a question of intention.

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In *Martin v. Mowlin* (cited ante, 144 and 266, notes (X) and (L), one Henry Weston being in possession of a parcel of copyhold lands called *Newclose*, as mortgagee, devised all his lands, tenements, and hereditaments, to his son in tail; and bequeathed all his personal estate to his son likewise, and made him executor. The question arose, whether the land called *Newclose* passed to the son under this general description. Lord Mansfield said, if it appeared that the testator really meant and intended to devise this close as land, it would then be a devise of land, the mortgage being forfeited at law, and the estate in the land become absolute. But if it appeared that the testator meant and intended it as a bequest of money only, then it would be considered in a court of equity as a specific bequest of the money. After expressing his opinion, that the testator all along meant to dispose of the mortgage in question as personal estate, he proceeds, as in note (X), p. 144, ante, "A mortgage is a charge, &c." stating that a devise of it will pass the land to every purpose, and that, by a will not made and executed with the solemnities required by the statute of frauds. Now, this, it is apprehended, must be understood as referring to the equitable operation of the will, and not to its effect at law, for Lord Mansfield had clearly in view an equitable principle, and such as subsequent judges at law have never admitted. The will was of copyhold lands, and consequently in itself not within the statute as to the requisition of witnesses. Nothing, therefore, can be inferred from the circumstances of the case. If Lord Mansfield had decided that the land did pass to the son in tail under the will, the statute of frauds could not have been objected to the decision, since that statute did not require a will of copyholds to be executed by three witnesses, and it does not appear on the report, how many witnesses attested the execution of the will in *Martin v. Mowlin*.

Dictum of Sir W. Grant considered and approved.

In the lately decided case of *Silberschildt v. Schiott*, cited fully, p. 424, ante, n. (P), Sir W. Grant, M. R. was of opinion, that a gift of money secured on mortgage before foreclosure, would carry the interest of the mortgagee in the land upon which that money was secured. Hence, it may be inferred,

that since money may be bequeathed by an unattested will, land in mortgage may also be devised by a will executed otherwise than by the statute of frauds. Without doubt, such a will would pass the whole equitable and beneficial interest of the mortgagee both in the land and in the money to the devisee, leaving however, the legal estate to descend to the heir at law as a trustee for the devisee; for per Lord Hardwicke, in *Brudenell v. Boughton*, (2 Atk. 372), "it is very certain no devise of [the legal estate in] lands can be made [in equity] but with such solemnity accompanying the execution of it as is directed by the act; and it is equally clear, where a sum of money is given originally and primarily out of land, a will with that charge must be equally executed with the same solemnity, because it is considered in a court of equity as part of the land, since it can only be raised by sale or disposition of part of the land; and this is analogous to the rule of law, that a devise of rents and profits is a devise of the land itself." It may indeed be contended, that this doctrine of Lord Hardwicke is not parallel with the point under consideration, for that the money due on mortgage is not primarily and originally chargeable on land, inasmuch as the personal estate is the acknowledged primary fund for payment of the mortgage money. But it is observable, that in the case before Sir W. Grant, it was admitted by the parties, before he delivered his judgment, that the legal estate in the lands in question descended to the heir at law, and did not pass by the will though the will was duly attested. Sir W. Grant, however, was of opinion, that the legal estate in the land did pass by the will to the devisee, on the ground that the will being properly executed and the mortgage foreclosed, the lands were as much the testator's property as any other part of his estate, and that a clear intent to pass the lands appeared on the face of the will. If the will had not been duly attested, it is to be collected from the report, that his Honor's opinion was, that *all* the interest of the mortgagee would not have been carried to the devisee by words which by implication only could be made to embrace them. The words were descriptive of property, in lieu of which the testator had land; and it was held, the land passed, that being on the whole will the clear intention of the testator. If, then, a devise in language which imports a bequest of the money only, but which evidently points to the entire interest of the testator in the land, will not after foreclosure pass the legal estate to the devisee, unless the will be attested pursuant to the statute; why should the same words before foreclosure, and by a will infected with the same vice, pass the legal estate to the devisee, when the testator has but a bare legal estate in the land, to pass which an express devise, as distinguished from an implied intention to devise, is required? It may be said, that until foreclosure the mortgage is but a mere personal pledge; and, therefore, devisable by an unattested will, like any other personal chattel. This is conceded to its fullest extent. But this is an equitable interpretation of a mortgage transaction. In courts of law, the language is very different. The judges there say, the mortgagee has the legal estate; and as Lord Hardwicke observes, it is very certain that such legal estate cannot, by any circumvention, be devised by a will unaccompanied with the solemnities required by the statute.

It cannot be contended, that a simple bequest of mortgage money in a will attested by no witness, will transfer to the legatee to the legal estate in

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Will, to pass legal estate, must be duly attested.

the land too, though such a bequest in a will duly attested for the devise of real estate will, it seems, have that effect, if a clear intention to pass the legal estate can be collected. With this qualification, therefore, it is submitted, the general expressions of Lord Mansfield and Sir W. Grant must be received, for clear it is that the latter excellent lawyer never could have meant to inculcate a doctrine so repugnant to principle as the general language in *Silber-schildt v. Schiott* might seem to imply. When, therefore, he is made to say that the will of a mortgagee, disposing of the money, will carry all the interest of the testator in the land, he must be understood to allude to a will properly executed, for with that qualification he both commences, pursues, and terminates his judgment; and it is worth observing, that the will before him was so executed and attested. We may therefore conclude, that when Sir W. Grant says a gift of the money will carry all the mortgagee's interest in the land, he must be understood to add, provided, and only provided, the will be properly executed and attested; which (by the way) fairly implies, that, if the will be not properly executed and attested, the legal estate in the lands will not pass to the devisee.

Will of mortgagee, who has purchased equity of redemption, void, if not attested by three witnesses.

It merely remains to notice on this head, the case of *Whitechurch v. Whitechurch*, 9 Mod. 124, which decided that a will by a mortgagee, for a term of years, who had purchased the equity of redemption and reversion in fee-simple, was void so as to pass the lands, because it was not attested by three witnesses; but it was insisted at the bar, that it was good to pass the mortgage term, which it was said, was a term in gross and separated from the inheritance; but it was decreed, that it was a term which attended the inheritance by implication of law, for there was no apparent intention that the testator designed it to pass as a separate interest.

Devise of mortgage to three trustees and survivor.

In the chapter on the devise of mortgages, mention should be made of the case of *Harrison Ex parte*, 3 Anstr. 836. In that case, a mortgagee devised his property real and personal to three trustees, and the survivor or survivors of them, and to *the heirs, executors, and administrators, of such survivor*, for certain trusts (not, however, trusts for sale, nor any which by necessary implication could be held to carry a fee to the trustees). The fee was considered as having descended upon the infant heir at law of the testator, until by the deaths of two of the trustees the contingent remainder in fee to the survivor should take effect. The mortgagors wishing to redeem, petitioned the Court of Exchequer, who referred it to the Deputy Remembrancer to inquire whether the infant was a mortgagee within the meaning of the statute of Anne. He reported that he was. The court, after much consideration, confirmed the report, and directed the infant to join in the conveyance. See further on this head, of contingent remainders arising from similar limitations, *Weale v. Lower*, Pollexf. 57. *Vick v. Edwards*, 3 P. Wms. 372. *Hawker v. Hawker*, 3 Barn. & Ald. 537. *Fearne's Cont. Rem.* 525. 7th ed. 357. 1 Pres. Con. 302. 2 ibid. 136, and 2 Pres. Abs. 99.

"All my property at A." will not pass mortgage, the deeds of which are there.

It may also be here, in order to advert to the case of *Fleming v. Brook*, 1 Sch. & Lef. 318, where it was held, that a general bequest of all the testator's property at a particular place, or in a particular house, will not include the benefit of a mortgage, the deeds relative to which are found there. In the case alluded to, A. M. by his will, bequeathed thus:—"I give to the plaintiff all my property, of whatever nature or kind the same may be, that shall be

found in my house in Duke Street, except a bond of F. M., Esq. in my writing-box, in the said house contained." There was found in the testator's house, a deed of mortgage from G. C. to the said testator, and a bond, being a collateral security thereto; and also several banker's accountable receipts for large sums of money. It was argued, that because the testator had here expressly excepted one *chose in action*, it was manifest, he intended the others to pass by his will to the devisee. But Lord Redesdale held, upon the authority of *Moore v. Moore*, 1 Bro. C. C. 127. (which was decided on a view of all the cases), that *choses in action* have no locality; and therefore, that neither the mortgage, the bond, nor the banker's receipts, passed to the plaintiff, though his Lordship said, bank notes would have passed, they being *quasi cash*.

Connected with the subject of this chapter, is the doctrine of ademption. In the *Attorney-General v. Parkin*, Amb. 566, the testator devised all his mortgages, bonds, and securities, to the masters, fellows, and scholars, of Pembroke Hall College, Cambridge; several of the mortgages were paid off in the testator's life-time, but it did not appear whether voluntarily or by compulsion. One question was, whether this receipt by the testator, of the money due on the securities in his life-time, was an ademption of the devise, and it was held by Lord Camden, that it was not; but that the legacy should be made good out of the general assets, though the securities were gone, and his Lordship over-ruled the distinction between a compulsory and a voluntary payment of the debt as to ademption; and stated, that the ground of his judgment was, the intention of the testator. Lord Thurlow, however, in *Ashburner v. McGuire*, 2 Bro. C. C. 111, said, he could not agree to Lord Camden's decision, in this case of *Attorney-General v. Parkin*, and explained the reason of his dissent very fully in *Stanley v. Potter*, 2 Cox's Ch. Ch. 189. Lord Loughborough, on the contrary, in *Coleman v. Coleman*, 2 Ves. jun. 540, thought Lord Camden decided very rightly, and Lord Alvanley, in *Chasworth v. Beech*, 4 Ves. 566, considered the determination sustainable, on the ground that the testator did not mean to devise any particular mortgage to the college, but all his mortgages and securities whatever they might be; it being merely a method of describing all his personal estate placed out at interest. In *Fryer v. Morris*, 9 Ves. 360, the testatrix devised to C. B. money due on a certain note, which she afterwards received and deposited with her brother, with whom she had no other money; she afterwards drew out 10*l.* part of it, and left the residue in her banker's hands, which was found there at the time of her death. This, Sir William Grant held to be a specific legacy and an ademption; observing, that the testatrix's depositing the money in her banker's hands, and subsequently receiving a portion of it, was not so much to be considered as a partial ademption, as evidence of an appropriation of the whole sum to her own immediate use. See also *Hambling v. Lister*, Amb. 401. *Roberts v. Pocock*, 4 Ves. 150. *Innes v. Johnson*, *ibid.* 568. *Kirby v. Potter*, *ibid.* 748. *Raymond v. Broadbelt*, 5 *ibid.* 199. 205. *Gillaume v. Adderley*, 15 *ibid.* 384, and *Acton v. Acton*, 1 Meriv. 178.

Two late cases have fully decided, that questions of this kind depend entirely on the peculiar circumstances of each case, but parol evidence will, it seems, be admitted to shew the real intent and meaning of the testator. In the first case alluded to, E. D. by her will, dated October 9, 1805, after reciting, that it was the wish and desire of her mother and herself, that the 500*l.*

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Effect of testator's receipt of mortgage money after devise of mortgage.

Such receipt is an ademption if mortgage be specifically devised.

they had then out on mortgage, should be given to the plaintiff and her family in manner thereafter-mentioned, gave and bequeathed to her executors, immediately after the decease of her mother, the said 500*l.* with all interest due thereon, upon trusts for the plaintiffs, as in the said will mentioned. The testatrix, at the time of making her will, had a sum of 500*l.* out on mortgage, which she afterwards called in and applied to different purposes. The mother being dead, the testatrix took out administration to her effects, and afterwards died without having altered or revoked her will. The question was, whether the legacy was adeemed. The Master of the Rolls thought, that attending to the description of the thing given, the legacy was not adeemed by calling in the mortgage. The essential characteristic of the legacy was, that it consisted of a sum, in which the testatrix admitted, that her mother and herself had some sort of joint interest, and which they were both desirous of giving to the plaintiff and her family. This characteristic was not at all dependant on the particular security on which the money might be placed. The testatrix considered the circumstance of its being at that time out on mortgage, as merely accidental. She spoke of the 500*l.* they had then out on mortgage. That was descriptive of the present situation of the money. The next day it might not have been out on mortgage. But it would still be the 500*l.* in which the mother and the daughter had a joint interest, and which at the time of the will they had out on mortgage. The thing given, was not the mortgage but the money. It was the said sum of 500*l.* that she gave to her executors. What was the said sum? That sum of 500*l.* which belonged to her and her mother, and which at a given time was out on mortgage. Whether it remained out on mortgage at the time of the testatrix's death, appeared to his Honor to be a matter of indifference. That circumstance was no ingredient in the gift, either by way of condition or of inherent description. He, therefore, was of opinion, that the legacy was due. *Le Grice v. Finch*, 3 Meriv. 50. The second case is, that of *Graves v. Hughes*, 4 Madd. Rep. 381. There the testatrix, by a codicil to her will, bequeathed to W. H. an *arrear* of interest due on a mortgage, amounting to 648*l.* On a reference to the master, he found that 646*l.* was due to the testatrix for interest when she made her codicil, and that a sum to that amount was due to her for interest when she died; and upon the affidavit of F., he found that the interest received by the testatrix after making her codicil was so received in respect of interest as it accrued due after such codicil, leaving outstanding the arrears of interest due when the codicil was made. On this affidavit, it was held by Sir John Leach, Vice-Chancellor, that the legacy was not adeemed by the receipt of interest subsequently to the making of the codicil. See 4 Madd. Rep. 389, and 2 Madd. Ch. 88, 2d edit.

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Mortgagee bequeaths money to mortgagor, who dies in lifetime of testator, legacy lapsed.

It may be further remarked, that if the mortgagee bequeath to the mortgagor in these words, "I give to N. D. the sum of 400*l.* which he owes me on mortgage of his estates in Shropshire; and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon;" and N. D. dies before the testator, this will be a lapsed legacy; and the executor of N. D. must pay the money. In order to prevent a legacy from lapsing by the legatee's death, it is necessary to substitute another legatee in his stead. *Toplis v. Baker*, 2 Cox Ca. Ch. 120.

Devise of equity of redemption.

An equity of redemption, we have seen, (ante, 251, 2, 3. 266, 7, 8.) may be devised in strict settlement or otherwise, by a will attended with the same

solemnities as the law requires for the devise of land (et vide *Phillips v. Hele*, 1 Ch. Rep. 190); and it seems that general words, which will pass a reversion, will be sufficient to transmit the equity of redemption on a mortgage for years, as an incident to that reversion, to the devisee. In *Amhurst v. Litton*, Fitzg. 99. (S. C. decree affirmed, 3 Bro. P. C. 486) land mortgaged for two several terms of 1000 years each, was afterwards settled on A. in tail, with remainder to B. in tail, with remainder to A. in fee, by which A. first and B. afterwards had an equity of redemption incident to their estates. A. by will appointed the mortgages to be paid off, and then the mortgage term to be assigned to M.; and by the same will devised all his lands (being also seised in fee of other lands) to C. and his heirs. By this general devise it was admitted that the reversion, expectant on the mortgaged terms, passed to C. in fee. The estate tail and remainders being spent by the deaths of A. and B. without issue, the question was, if the equity of redemption that was incident to the reversion in fee of A., passed to M. by the will, and was thereby severed from the reversion. It was decreed by Lord Chancellor King, with Raymond, C. J., and Denton, J. assistant, that the equity of redemption was not severed from the reversion, but that the same passed to C. as incident thereto, and that C. should be let in to redeem.

Devise of reversion carries equity of redemption as an incident.

In reference to copyholds, it is observable, that until the mortgagee is admitted, the legal estate remains in the mortgagor. Co. Copyh. s. 59. *Doe v. Wroot*, 5 East, 132. The mortgagee is seldom admitted until after forfeiture, as the admission, by clothing him with the legal estate, would subject him to the customary services, &c. and also to the payment of the fine due on alienation; and as the surrender precludes the mortgagor from alienating the land to any other person, or charging it with any incumbrances, otherwise than subject to the mortgage; and as it entitles the mortgagee to call for an admission at pleasure (*Fawcett v. Louther*, 2 Ves. 300): his security is not impaired by the want of admission. It follows from this doctrine, that until admission the legal estate does not pass from the copyholder; and that a surrender to the use of his will will be necessary in order to enable him to devise it. This was expressly decided in *Kenebel v. Scrafton*, 8 Ves. 30. S. C. 5 Ves. 663. 2 East, 530. But without such surrender an equity of redemption will pass by the devise, even if the mortgagee shall have been admitted. To a devise of the mortgage a surrender to the use of the mortgagee's will will be requisite, if he has been admitted, but not without. These observations however must be received with due reference to the late act, 55 Geo. 3. c. 192, whereby dispositions of copyhold estates by will are made effectual without previous surrenders to the uses thereof. This act, it is observable, has a prospective, and not a retrospective view. 1 Watk. Cop. 200, 4th edit.

Copyholds.

To whom the mortgaged estate will belong in case of the mortgagee's death without a will, see post, Chap. XV. vol. ii. 662.

CHAP. XIII.

OF PRIORITY (A) OF INCUMBRANCES IN LAW AND EQUITY, IN WHICH THE DOCTRINE OF TACKING PRIOR AND LATTER SECURITIES TOGETHER IS CONSIDERED (B).

General creditors bound by particular equity.

IT is a general rule that wherever a right in equity attaches against any person, that equitable right binds all persons claim-

Difference between priority in civil and English law.

(A) The priority of creditors allowed by the civil law proceeded on a very curious, if not a very dangerous principle. Thus he who had furnished money to repair a house, which was in danger of falling, was preferred to the seller of that house who demanded the price of the sale. So he who had let a barn to a farmer, was preferred for the rent of his lease, before the proprietor to whom the farmer was indebted for the rent of the farm, on which the fruits which were put into the barn, grew. In like manner the expences at law, being the debt of all the parties, were preferred to all privileges whatsoever; and those who had privileges on moveables were preferred to the privilege of the king. Funeral charges also were preferred before the rent due to the landlord of the house; and in cases of a concurrence of privileges, their preference appeared to be regulated by the distinctions which the nature of the privileges made. With us, however, the preference of creditors is regulated by the species of security which they hold for their respective demands; fortified by the law, that those securities to confer priority must, for the most part, be executed in the presence of witnesses, who can bear testimony as to the time when the respective securities were given. The student is left to his own conclusion which mode of determining the priority of creditors is the preferable.

Division of chapter.

(B) This chapter may be divided into three sections, the first containing the doctrine of legal and equitable priority, from hence to p. 519; the second, the doctrine of tacking, from 519 to 534; and the third, the doctrine of notice affecting the two other subjects of the chapter, from 534 to the end.

Distinction as to tacking, and priority submitted.

It may not be amiss in this place, to premise a distinction, which though not always observed in terms, may, it is submitted, be drawn with great propriety; namely, that with regard to the doctrines of tacking and priority, it seems inaccurate, strictly speaking, to say, that when a subsequent incumbrancer buys in a prior mortgage, he *tacks* the prior mortgage to his subsequent incumbrance; for, in fact, he merely acquires a priority to mesne incumbrancers by such purchase. But if a prior mortgagee advances further sums to the mortgagor, which are secured by judgment or a second mortgage, then it may be correctly stated, that he has a right to *tack* the judgment or mortgage to his prior charge. *Tacking* therefore, it is submitted, can only occur when an eigne incumbrancer acquires a subsequent mortgage or charge; and *priority*, when a subsequent incumbrancer acquires the first mortgage or charge

ing under or against that person, who have not specific liens upon any part of his property. From hence it follows that general creditors are in all cases bound by a particular equity. This is the constant practice in all cases of agreement.

Therefore if money be lent and there is a contract or agreement for a mortgage, if the party dies without making a mortgage, and the estate descends to the heir as assets for specialty debts, that contract is superior to the right of those specialty creditors. And a court of equity, after the death of the party, and when all their engagements are to be arranged, will give a specific lien. As in the case of *Sir Simeon Stuart (a)*, who was indebted to W. who pressed him for some security. Sir S. S. sent him a letter engaging to make a mortgage on some part of his, S.'s estates. Between the date of his letter and his death, he had made a conveyance to trustees for the payment of all his debts. It being held that there was a sufficient contract for a mortgage, the question was, whether W. had a right to stand as a mortgagee in preference to the general creditors; and it was held that general creditors could not stand in any other way, than the person from whom they claimed, at the time the act was done in their favor, and therefore were bound by all the equity, to which

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Agreement for
mortgage by
letter, specific
lien against
other creditors
(c).

(a) Stated 3 Ves. 576. 582.

conferring a title to the legal estate.—But this distinction is not attended to in the present chapter, nor indeed throughout the work.

The late Lord C. B. thought "*tacking*" a strange term, 8 Price, 486; he seems to have considered the word "*unite*" as more expressive and elegant. Philologically speaking, the word "*unite*" signifies such a close combination of parts as to lose all individuality. The word "*tack*" from *tango* to attach to, signifies to come so near to as to touch but not to fall into or unite with the thing touched. The one alludes to a spiritual, the other to a corporeal connection. The fitness of the term cannot well be impugned, however much its elegance may be attacked.

Tacking seems acknowledged in the civil law, *si in possessione constitutus, nisi ea quoque pecunia tibi a debitore offeratur vel reddatur, quæ sine pignore debetur (quam mutuam simpliciter accepit) restituere non cogeris, &c.* Cod. 8. 27. 1. but see Dig. Lib. 13. lib. 7. s. 8.

(C) So an undertaking to execute a mortgage was considered to be a good equitable mortgage in *Becket v. Cordley*, 1 Bro. C. C. 353. *Infra*, vol. ii. p. 1049.

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he was liable, it was therefore held a mortgage *from the date of that letter*, and was classed prior to a judgment subsequent.

Incumbrancer having legal estate preferred (D).

Judgments paid in turn with mortgages.

On an appeal to the House of Lords in the case of *Symes et al. v. Symonds et al.* (b) it was settled, that if there be several mortgages or other incumbrances upon the same estate, the first incumbrancer who has the legal estate, shall be preferred to the second, and so on, according to the periods at which their respective securities bear date; and that mortgages were not to preferred, but will take place according to priority, and as they stand in order of time with statutes, judgments, and recognizances (E).

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Judgment creditor obtaining assignment from two trustees of attendant term, preferred to mortgagee procuring assignment from other trustee first.

So, in another suit respecting the same estate (c), the case was, Sir W. B. in 1687, borrowed 1000*l.* of Lady B. on a judgment; at that time there was a term of years kept on foot and assigned to N., Lady B., and S. B., to attend the inheritance. Afterwards, in 1688, Sir W. B. and N. one of the three trustees, assigned the term to W. and M. for securing 1500*l.* by way of mortgage: then *Sir W. B. together with the two other trustees, viz. Lady B. and S. B. assigned the term to G.* for the better securing the 1000*l.* due to Lady B.; the question was, whether W. and M. should have the benefit of the whole term, or only of a third part of it, one only of the three trustees having joined in the assignment? It was insisted

(b) *Symes et al.* creditors of Sir W. Basset v. *Symonds et al.* creditors by mortgage, 1 Bro. P. C. 66. Sir William Basset v. *Hungerford et al.* 2 Vern. 524. 1 Eq. Ca. Abr. 144. Ca. 5. [S. C. post, 540.—Ed.]

(c) Lord Bristol et al. creditors of

Mortgage void by antedating it.

(D) Vide etiam S. P. 436. 446. But if a mortgagee fraudulently antedate the mortgage deed, for the purpose of over-reaching a marriage settlement or other instrument conveying the legal estate, the mortgage will be void. The fact of fraud, however, must be previously tried at law. *Osborn v. Le,* 9 Mod. 96.

Priority by possession of ship.

In analogy to this rule of real property, it has been held, that if the owner of any number of shares in a ship, mortgage the same, and afterwards makes sale thereof to different persons, the one who obtains possession of the ship and the grand bill of sale, will be preferred. *Gillespy v. Coultis*, Amb. 652.

(E) It was decreed otherwise at the Rolls, but that decree was reversed on appeal to the Lords, where it was adjudged as above. 7 Vin. Abr. 49.

that, although but one third part passed as to the legal estate, yet the *cestui que trust* could make a good assignment in equity and Lady B. ought to be bound thereby; because she lent her money on the credit of the judgment, and, before the assignment to G. had notice of the assignment to W. and M. But the Lord Keeper determined, that, although there was a term attendant, yet a judgment was an *equitable lien* on the inheritance, and, consequently, affected the term; and therefore Lady B. having got the legal estate as to two-thirds of the term in G. in trust for herself, should have the benefit thereof, although she had notice of the mortgage and assignment, made by the *cestui que trust*, jointly with one of the trustees.

So (d), where there was a first mortgage which was paid off, but no re-conveyance, and next a judgment creditor, and the plaintiff, a second mortgagee, filed a bill against the first mortgagee, the mortgagor, and judgment creditor, to have a re-conveyance from the first mortgagee (he being satisfied) which he acknowledged by answer; the first mortgagee, pending the suit, assigned the mortgage to the judgment creditor (G); and the Lord Chancellor declared this to be justifiable in both; and decreed that, unless the plaintiff, the second mortgagee, would redeem, and to pay off the debt by judgment, the bill should be dismissed.

Judgment creditor buying in first mortgage, pending bill by second mortgagee to redeem first, preferred (F).

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(d) *Turner v. Richmond*, 2 Vern. 81. [et vide S. L. in *Belchier v. Butler*, post, 454, 5, 6, in notis.—Ed.]

(F) The *lis pendens* makes no difference to the purchase of a prior incumbrance, *Hauckins v. Taylor*, 2 Vern. 29, unless the purchaser be a party to the cause, or the suit has proceeded so far as a decree and a direction to settle priorities, *Wortley v. Birkhead*, 2 Ves. 571. S. C. 3 Atk. 811; et vide *Knott Ex parte*, 11 Ves. 619. Redesd. Tr. Pl. 168, 3d edit.; and for same law as to third mortgagee buying in first legal incumbrance, post, 454. 540. Sed vide *Belchier v. Butler*, 1 Eden's Rep. 523. cited post, 455, where the purchaser of the first incumbrance was a party in a cross cause. But such subsequent purchaser, mortgagee, or judgment creditor, will not be allowed to protect himself by the possession of the legal estate where he has had notice of the prior conveyance or incumbrance. Vide *Saunders v. Dehew*, 2 Vern. 271. S. C. cited post, 534, 5; also vol. ii. 967.

Lis pendens.

(G) Which destroyed his lien in equity. Per Lord Parker, Chancellor, in *Hagshaw v. Yules*, 1 Str. 240.

We must here remark, with a view to some observations that will hereafter occur in this chapter (*dd*), that, in the two last-mentioned cases, the assignments of the legal estates were not made with a view to alter the priorities amongst the claimants but to preserve them as they originally stood.

First mortgagee concealing his incumbrance, postponed (H).

But the last proposition, as to the discharging incumbrances, must be understood with this restriction, that the mortgagee be not guilty of any fraud or artifice, by concealing

(*dd*) [Try post, 519.—*Ed.*]

First mortgagee standing by, and not disclosing his incumbrance, postponed.

(H) So if the first mortgagee stands by and suffers a second mortgagee to advance his money on the supposition that he is about to have the legal estate, without disclosing his own prior incumbrance, it is an acquiescence in the transaction, and the sufferance of a fraudulent treaty to go on, for which he shall lose his priority. Thus the late Master of the Rolls observed, in the case of *Cholmondeley v. Clinton*, 2 Meriv. 362, “if indeed Lord Orford had been aware of his title, and had stood by and seen persons advancing money on the estate, on the faith of its belonging to Lord Clinton, some question might be made on the ground of acquiescence; but Lord Orford could not be said to acquiesce in acts which he did not know he had any right to dispute; and therefore all that had been said about acquiescence, either on the part of Lord Clinton or Sir Lawrence Palk, seemed to be irrelevant in a case where all parties were under the influence of the same common mistake.” Vide etiam *S. C.* 2 Jac. & Walk. 1. In like manner, if a mortgagee permit a person who has purchased the equity of redemption without notice, to continue building on the estate without giving him notice of the incumbrance, this Lord Hardwicke held, should be a reason why a court of equity would not assist him in setting up the incumbrance. *Steed v. Whitaker*, Barn. C. C. 220. On the same principle the case of *Huning v. Ferrers*, Gilb. Eq. Ca. 85, was decided. A father tenant for life made a lease to the plaintiff for thirty years, who supposing his lessor to have good power to demise for that period, laid out a considerable sum of money in repairs. The defendant was the eldest son of the issue male of the lessor, and next tenant in tail to the estate. During the time the plaintiff was making the improvements, the son went to his father and told him he had not power to make such lease; that after his death the estate would be his; but never acquainted the plaintiff with that, or of the settlement made on his father’s marriage; but, on the contrary, wrote to the plaintiff to take care to keep one of the mills in particular in repair. The father then died; and the son recovered in ejectment against the lessee, who thereupon brought his bill to be quieted in the possession of the mills during the residue of his lease; for that the defendant was fully acquainted with the circumstances of this lease, and knew his father had not power to make it, and yet never forbade or cautioned the plaintiff from going on with the repairs; but, on the contrary, stood by and encouraged him in the proceedings therein, with a

his mortgage, or otherwise, to induce another person to give credit to, or lend his money on, such subsequent security; for, if he be, the subsequent incumbrancer will gain a priority thereby.

Thus, where, on a treaty of marriage between A. and B., C. the father of A., and D. the father of B. had a meeting together (e); at which meeting M., who had a mortgage upon C.'s estate, was accidentally present; C. and D. discoursed together on the subject, and talked of making a settlement upon the estate on which the mortgage to M. was secured: M. never mentioned to D. that he had such mortgage, but called out C. and reminded him thereof. M. then agreed with C. that he would take his personal security for the money, and they returned, when an agreement was entered into between C. and D., in the presence of M., to settle the estate in strict settlement. The marriage took effect, and M. brought an ejectment to recover the possession of this estate; whereupon A. and B. brought a bill against M. and C., in order to have a perpetual injunction: M. admitted all the facts, but pretended not to remember any thing of the agreement to accept C.'s personal security for the money lent. C. was examined as a witness in the cause for both parties) and swore to the fact of that agreement: and the Lord Chancellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that M. having voluntarily concealed his mortgage at the time of the treaty of

Mortgagee present at treaty for mortgagor's son's marriage; but said nothing of his mortgage; son, wife, and issue to hold against him.

(e) *Berryford v. Milward*, Barn. Rep. 101. S. C. 2 Atk. 40. Vide *Shep. Prac. Couns.* 482, pl. 9. And *quære*, if such conduct will not avoid a prior claim, at law, as fraudulent. when a person, knowing his own title, does not give notice of it to a person about to purchase, he shall never afterwards set it up against such purchaser. *Savage v. Foster*, 9 Mod. 35. —Ed.]

design to reap the whole benefit thereof when his father was dead. This, the court considered, was such a fraud and practice in the son as ought to be discountenanced; and thereupon decreed that the plaintiff should enjoy during the residue of his lease. See also *Edlin v. Battaley*, 2 Lev. 152. *Anon.* 1 Freem. 310. *Scot v. Scot*, 1 Cox, 367.

marriage, was not entitled to have any benefit from it against the plaintiff (i).

[439]
First mortgagee
being a counsel,
drawing a second mortgage,
and promoting
the loan without
disclosing his
own, postponed.

The equity of the latter incumbrancer will be still much greater, if the first incumbrancer be concerned in transacting the subsequent security; and omit to inform him of the demand. Thus, where D. N. and H., having lent B. 8000*l*. [D. 3000*l*., N. 3000*l*., and H. 2000*l*.,] upon a mortgage in fee of the manor of T., and on a statute in 16,000*l*. penalty as a further security (f); and H. being a counsellor, and afterwards consulted by J. as to a loan of 9000*l*. to B., on a mortgage of the manor of G., encouraged him to lend his money, drew the mortgage-deed, and inserted therein a covenant that the estate was free from incumbrances, making no mention of the statute which was taken, because T. was supposed to be

(f) *Draper et al' v. Borlace et al'. 2 Vern. 370.*

Mortgagor concealing defeasance, loses his estate, though third persons have notice thereof.

[439 *]

(I) A case similar to this is to be found in 2 Bro. P. C. 88. S. C. Lord Harcourt's MSS. cited 1 Madd. Ch. 292. A. made an absolute conveyance to B. for 1500*l*. B. immediately after executed a deed of defeasance for making void the said absolute conveyance on payment by A. to B. of 1500*l*. within sixteen years. B. on his marriage settled the estate as his own absolute property on his wife for life, and after to her issue. It was in proof that A. knew of the transaction, and made the conveyance purposely to enable B. to obtain a fortune in marriage though by another lady, and not the wife he afterwards married. The court below decreed, that A. was bound by the settlement as a *particeps criminis*, and that the deed of defeasance was void, and the decree was affirmed, though it was stated that the wife's father had notice of the defeasance before the settlement was made. But this latter fact seems to have been a mere general affirmation of the father's knowledge of the defeasance, arising from his information as a resident in the neighbourhood, and what he might have obtained through indirect channels. But A., who was the principal actor in the fraud, knew of B.'s intended marriage with the wife he really did marry, and stood by without acquainting the wife's father of the defeasance. It was for the punishment of A. therefore that the decree was made. But the Lords were pretty equally divided in opinion. Eight voted for the affirmation of the decree, and seven for its reversal. Lord Parker was among the former, and Lords Cowper and Harcourt with the latter.—Agreements *contra fidem tabularum nuptialium* are treated of by Mr. Forblanque, 1 Trea. on Eq. 266, 5th edit.

Whether the wilful concealment by a creditor of his debt (otherwise good) from the parent of a woman on a treaty of marriage between her and the debtor, will alone be sufficient to postpone the debt, was made a *quære* in *Scot v. Scot*, 1 Cox, 367, a case of the most flagrant fraud.

deficient. The question was, whether H. should be admitted to take advantage of the statute to lessen J.'s security upon the manor of G. ? And it was held he should not; for if he, who only concealed his incumbrance, should be postponed, much more ought H., who was intrusted as counsel by the mortgagee, promoted the loan, and drew the conveyance, with covenants that the estate was free from incumbrances (K).

And if a first mortgagee be a witness to a second mortgage-deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference (g).

First mortgagee witnessing second mortgage, [440] without disclosing his own, postponed.

It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence (h) (L).

Though not in proof, he knew contents of second mortgage.

(g) *Mocattu et al'. v. Murgatroyd*, 1 P. Wms. 393.

(h) *Ibid.*

(K) The manors of T. and G. were ordered to be sold; and, out of the monies arising from the sale, D. and N. were first to be paid, then J., and lastly H.; and if there was any surplus out of the sale of T., after the payment of D. and N., the same was to be paid to J., towards the discharge of his debt. Note, H. had obtained from J. a covenant that H.'s debt should have a preference.—As to what notice a counsel or agent shall be said to have at the present day, by being employed in the same business, see post, 596. and note there. In *Hunsden v. Cheney*, 2 Vern. 150, a person stood by and said nothing of a deed which he knew created an entail. He was held compellable to remedy the mischief, which his fraudulent silence occasioned. And, it is observable, that where a tenant in tail, who conceived himself to be seised in fee, settled the estate upon his intended wife by way of jointure, and the settlor's younger brother, who was entitled to the estate in remainder, and knew of the entail, engrossed the settlement but gave no notice of the entail, because, as he admitted himself, he apprehended his brother would destroy it; and the settlor died without issue—in a question between his widow and the younger brother as to the validity of the jointure, the court held, that she should enjoy against the brother and all claiming under him. And this decree was affirmed on appeal to the House of Lords. *Rao v. Pote*, 2 Vern. 239.

Reference to decree.

What notice a clerk has by engrossing a deed.

(L) To deprive a creditor of his right, it seems requisite that it appear by some act, that he is not only aware of what is doing to his prejudice, but that he assents to it. By the civil law, a creditor was not to lose his

In what light the signature of a witness ought to be viewed.

*Issue in tail
under settle-
ment, encourag-
ing stranger to*

Thus, where N.'s younger brother, having an annuity of 100*l. per annum* charged on lands by his father's will, con-

mortgage, unless it was obviously his intention to resign it, or unless there were grounds to charge him with dishonesty, for not having declared his right when he was under an obligation to do so. Thus in the strong case put by Justinian in the digests (Lib. 39. ff. *de pign. act*), if a mortgagor sign as a witness the will of the mortgagee, whereby the lands hypothecated are devised to the testator's children beneficially, he shall not lose his right of redemption, although the testator might have added, that he had purchased those lands of the witness. There is indeed a considerable difference between a creditor signing an instrument as a party, and his signing it only as witness. Whatever he signs as a party binds him without doubt. But in deeds which he signs as a witness, and where the signature is put only for a testimony to the truth of what is transacted between the contracting parties, one cannot draw a consequence from the signature of the witness that may be of prejudice to him unless it can be proved that he was fully aware, when he signed the instrument, that his silence would be the occasion of cheating one of the parties to the contract. But if a witness does not contribute any thing on his part to the cheating and over-reaching any of the parties, and if he gives no express consent which derogates from his right neither his presence nor his signing ought to hurt him.

*Doctrine in text
questioned and
qualified.*

The learned author therefore adds a query to the last proposition in the text, in the Index to the 4th edit. of this work, and, from what has been already premised, it seems very properly placed. Such, however, appears to have been the old doctrine of the Court of Chancery, as in *Clare v. Bedford*, cited in *Hunsden v. Cheney*, 2 Vern. 151, where it was held, that the security of Clare, the plaintiff, should be postponed, from the circumstance of his witnessing a subsequent mortgage to the defendant, and telling out the money at his master's chambers, being his clerk. So in *Hunsden v. Cheney*, ubi supra, the mother, who was the absolute owner of a term, and was present at a treaty for her son's marriage, and heard her son declare that the term was to come to him at her death, and was a witness to the deed whereby the reversion of the term was settled on the issue of this marriage after her death, was held compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death. In like manner in *Welford v. Beezley*, 3 Atk. 503. S. C. 1 P. Wms. 771, n. (1). 1 Ves. 6, it was held, that a mother who witnessed and knew the contents of certain marriage articles, whereby 100*l.* was agreed to be settled on her daughter for her separate use, was bound to perform the articles; for that her signature to those articles as a witness (it being in proof that she knew and agreed to the contents) was sufficient evidence of the agreement therein recited within the statute of frauds, although she was not in terms a party to them. But Lord Hardwicke thought the bare attesting a deed by a person as a witness, would not create such a presumption of his knowledge of the contents as to affect him with any fraud, for a witness was only to authenticate it and not to be privy of the contents. This seems to be the true distinction. In the cases cited, there are clear circumstances stated,

from which it may be inferred, that the party attesting the deed had previous knowledge of its contents, and it was that knowledge, and not the bare attestation, that made them liable to the performance of agreements of which they were aware, and to which they had with a contrary and perhaps fraudulent intention affixed their signatures. Mr. Peere Williams, jun., therefore, with good reason, subjoins to the report from which the statement in the text is taken, "Qu. tamen, Whether the bare *attesting* a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrancer; since, at that rate, a prior mortgagee or incumbrancer may, without any fraud or ill intention on his side, be liable to be cheated of his security; and so I find it said by Lord King, in my father's report of an *Anonymous case*, in Mich. 1732." Lord Thurlow likewise observed, referring to *Mocatto v. Murgatroyd*, that he did not leave that case as a case which he should have determined in the same manner; for a witness in practice was not privy to the contents of the deed. *Becket v. Cordley*, 1 Bro. C. C. 353, et vide 1 Fonb. Trea. Eq. 165, note (n), 5th ed.

At law a witness is not supposed to be acquainted with the contents of the deed he witnesseth, *Reed v. Williams*, 5 Taunt. 257, where it was in effect held, as the placita states, that notice of the contents of a deed is not to be presumed from the fact of attesting another person's execution thereof. In equity there does not appear to be any well-founded reason for the establishment of a different rule, unless the first mortgagee, in confederacy with the mortgagor, agrees to conceal his mortgage, or is otherwise guilty of fraud. Lord Eldon, in delivering his judgment in the case of *Evans v. Bicknell*, 6 Ves. 190, is reported to have said, "Then, as to concealment, as the case of persons standing by as witnesses to deeds, if it is to be taken as a fact that the witness knows the contents of the instrument to which he is a witness, the engrossment of the mortgage by a person entitled under a prior entail, no recovery having been suffered; all these cases either of positive representation contrary to the truth, or concealment of what ought to be represented, are intelligible; but it is not to be denied, that where there has been mere negligence, though it may have very mischievous consequences, the court has not charged the party unless it has been so gross as to amount to evidence of fraud." In *Holmes v. Custance*, 12 Ves. 279, a bill was filed by a legatee against the executor for payment of his legacy. The defence set up was, that the testator, when he gave a legacy of 100*l.* a-piece to all the children of Robert H., meant George H., the former being dead at the date of the will; that under this impression the executor had paid to each of the children of George H. 100*l.*; and that the plaintiff, who was the only surviving child of Robert H., was subscribing witness to a receipt given by a trustee, upon payment to him of the legacy of one of the children of George H. upon certain trusts (the plaintiff being then clerk to that trustee). But the right of the plaintiff was held not barred by his merely signing the receipt as a witness, that receipt not amounting to a release or fraud. In like manner, in the recent case of *Lord Rancliffe v. Parkyns*, 6 Dow's P. C. 224, the Chancellor said, with reference to the doctrine of notice, "there is an old determination, that a witness to a will or deed shall be taken to have cognizance of all its contents. But that doctrine has not of late been acceded to; and it would be most mischievous, if one who has been a witness to a deed or will, and after-

First incumbrancer attesting execution of second mortgage, not postponed, unless proved that he knew contents of deed.

purchase annuity of his younger brother, given by their father's will, decreed to confirm annuity (M).

tracted with H. for sale thereof(i); H. went to N., and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his

(i) *Hobbs v. Norton*, 1 Vern. 136. where the Lord Chancellor [Finch] says, ignorance of his title differs the case (N).
Vide 2 Eq. Ca. Abr. 515, pl. 3. *Watts v. Creswell*, 9 Vin. Abr. 415, pl. 24.
See *Dyer v. Dyer*, 2 Ch. Ca. 108,

wards happens to be concerned in a transaction relative to other property, should be supposed to have notice of the contents of the will or deed to which he was a witness, so as to fix notice of them upon his principal on that accidental ground."—Hence, it appears, that a first mortgagee attesting a second mortgage deed without being acquainted with its contents, or without its being proved in evidence that he knew of the object and intention of the parties, will not, by the mere circumstance of attestation, be deprived of his priority.

[442*]
Rule holds, notwithstanding coverture or infancy.

(M) So, in *Huning v. Ferrers*, Gilh. Eq. Ca. 85, ante, 457, in notis, the decree was against the son, by reason, that the son knowing the imperfections of his father's lease, suffered the plaintiff to repair. And the rule, that an incumbrancer silently looking on, and permitting or encouraging a third person to advance more money on the estate, without giving notice of his incumbrance, shall be postponed till after the third person is satisfied, so far as such first incumbrance stands in his way, will, it seems, hold good, against a person promoting or encouraging the mortgage or bargain, although he or she be a *feme covert* or under age. So, at least, it was argued in *Gory v. Gertchen*, 2 Madd. Rep. 46, on the authority of Sug. V. & P. 597-8, 4th ed. 624, 5th ed.

Of instruments made in ignorance or mistake of rights.

(N) There are many cases in the elder Vesey's reports as to this point, which go to establish the doctrine, that instruments, obtained from parties ignorant of their rights, will be set aside, although there be no fraud or imposition in the case. See *Bingham v. Bingham*, 1 Ves. 126. *Cocking v. Pratt*, ibid. 400; and *Ramsden v. Hilton*, 2 ibid. 304. See also, *Evans v. Llewellyn*, 1 Cox C. C. 383. S. C. 2 Bro. C. C. 150. Lord King, however, in *Teasdale v. Teasdale*, Sel. Ca. Ch. 59, held contra. There a father, who conceived his son to be tenant in fee, (though he was in fact only tenant for life, with remainder to the father in fee) was privy to a settlement of the estate upon the son's marriage. The father afterwards finding out his right, contended that he was not bound by the settlement; for though he was privy to it, yet not knowing of his right, he could not give notice; and consequently was not guilty of any fraud. Lord King held him to be bound, observing, that as he knew of the settlement, he should not take advantage against it. His Lordship also adverted to the near relation of father and son, from which he said it was to be inferred, that had the real interests of the parties been fully understood, the father would have been required to join in the settlement on his son's marriage, or on his refusal, the marriage would not have taken place. The true distinction seems to be this:—If an instrument be made under the influence of the same common mistake, with neither *suppressio veri* on the one side, nor fraud on the other, and both parties have equal opportunities of ascertaining the true state of the facts, equity will not interfere.

father was seised in fee at the time of making the will, and if it had ever been revoked. N. told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the same time informed him, that he heard there was a settlement made of his father's lands before the will, which was in the hands of T., but that he had never seen it, and therefore could not tell what were its contents; and encouraged the purchase, telling H. he had not only paid his brother the annuity to that time, but had also paid his sisters 3000*l.* under the same will. The purchase was completed, and afterwards N. got the settlement into his hands, and would have avoided the annuity, the lands being thereby intailed. H.'s bill was to have the annuity decreed or re-payment of his purchase money; and though, on the hearing, there was no proof that N. had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper decreed the re-purchase of the annuity merely on the encouragement N. gave H. to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title, that he might have informed the purchaser of it when he came to inquire of him.

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And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, &c. charged. Thus where B., the elder brother of I. B., was under a settlement entitled to a real estate, charged with 8000*l.* for one younger child of the marriage, but subject to a

Person making false representation through mistake, where he might have known the truth, deprived of his priority, which binds the lands (o).

Cholmondeley v. Clinton, 2 Meriv. 362. But if an instrument be obtained from persons ignorant of their rights, but whose rights are known to the party obtaining the instrument, a court of equity will relieve. *Broderick v. Broderick*, 1 P. Wms. 259, and the cases referred to in the notes. Yet it must be observed, that if the party, to whom the true state of the title is known, refers to deeds or otherwise, out of which the other party, by using reasonable diligence, might have seen whether the representation were correct, there the party negligently passing over the title without investigating its merits, cannot have redress. *Pearson v. Morgan*, 2 Bro. C. C. 388. *Anslie v. Medlycot*, MS. 1 Madd. Ch. 263, 2d ed. . Et vide 1 Fonb. Tr. Eq. 117, 120, 5th ed. and ante, 387.

(O) This must be understood of a person who is a prior incumbrancer, or who is in some respect bound to give a faithful statement, when called on

[443 •]
Title not affected by misrepres-

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proviso, that, if the father should give to any of his daughters, or younger sons, any money or lands, for or in advancement in marriage or *otherwise*, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary (*k*). The father devised to I. B. 4000*l.* after the death of his (the son's) mother, and the residue of his personal estate, and died. Then the elder son suffered a recovery, by which he obtained the fee-simple in the lands. Afterwards I. B. applied to P. to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned 5000*l.* part of the 8000*l.* as a security, and also entered into a bond in a penalty for the same. P., previous to lending the 3000*l.*, applied by his solicitor to B., informing him of I. B.'s application, and desired to be informed, whether the 8000*l.* was a subsisting charge upon the estate; when B. declared that it was, and that P. might safely advance his money upon the security. B. also afterwards applied for, and obtained a sum of money to pay off the 8000*l.* portion; and gave P.'s solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice: B. dying soon after, the money was not paid, but from the death of his father, and down to his own death, he paid the interest of the 8000*l.* Upon his death the estate descended

(*k*) *Rickman v. Morgan*, 1 Bro. C. C. 63. 2 Ibid. 394.

— representation of
third person.

to reveal his knowledge of the circumstances of another, for if a person who is under no obligation gives an honest representation, although he might have been mistaken in his belief, yet he will not be bound to make good any mischief which such an erroneous account might occasion. Thus, where on a treaty of marriage the husband applied to the brother of the wife to know the amount of her fortune, and the manner in which it was secured. The brother represented it fairly as he then conceived it to be, and as being charged on a real estate under the father's will, adding, that the husband need not examine the will or the family deeds, the facts being certainly as he represented them. A recital to the same effect was also made in the settlement to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will, but this fact was unknown to all the family at the time of the marriage, and the Chancellor decreed, that the representation of the brother, under these circumstances, should not bind him to make it good. *Merewether v. Shaw*, 2 Cox C. C. 124. *Fox v. Mackreth*, 2 Bro. C. C. 420; and *Pasley v. Freeman*, 3 T. R. 52, where the effect of this distinction at law is fully investigated. See also the preceding note.

to his two daughters. B. had possession of the settlement, and knew of the advancements of the father to I. B.; but supposing them not to affect the portion, did not reveal the same to P. A bill was filed by the mortgagee against the daughters to have the 3000*l.* raised and paid out of the settled estate. They set up as a defence, that the bequest of the 4000*l.* and of the residue, was a satisfaction for the portion under the proviso inserted in the settlement. And it being held that the bequest was a satisfaction, it then became a question, whether B. had not bound himself and the land notwithstanding by his declaration, "that the portion was a subsisting charge?" It was agreed on behalf of the daughters, that if B. knowingly misrepresented the case to P.'s attorney, it certainly must bind him. All the cases were, that the person misrepresenting was bound by his own misrepresentation; but this went something farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the misrepresentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of P.'s solicitor to make every inquiry; he ought to have made the trustees parties. It was great negligence on his part not to take a legal security. He ought to have inquired what I. B. took under the will. The principle the court went upon, was by acting upon the conscience of the defendant in such cases; if the defendant was acting against conscience, the court would apply a remedy, but there was in this case nothing against conscience. B. was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the court to relieve against, and the land could not be bound. But by Buller, Justice, (who sat for the Chancellor) the only question is, whether P. has a right to have 3000*l.* raised for payment of his debt out of the estate of B. It is argued, that this is not to be done unless there is such a fraud as to affect land, and that here was no fraud, but B. acted innocently. It brings to my mind a case tried before me at Guildhall, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was, that, if one man tells another a falsehood, by which he is injured, the deceived

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*A. telling B.
falsehood by
which he is in-*

*jured, B. may
maintain action
against A.*

person has his remedy by an action (P). Those who wish to maintain the daughter's case, argue, that B. the father was a total stranger to the case, which argument admits the principle, that, if he had been interested, the declaration would bind. Here the person, of whom the question was asked, certainly had no interest. Fraud is a question of law, and of fact. It is always considered as a constructive fraud where the party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that here B. knew of the proviso and advancements, and that in this court he was obliged to take notice of them. In fact he had express notice. It is not like the case of a latter deed referring to a former one. The inquiry was a very proper one on the part of P., and completely repelled any imputation of negligence in his agent, and the inquiry was properly made of the party immediately interested. B., at the time of the inquiry, had the equitable interest in the estate, and, upon the application, assured P. that he might safely lend his money. The inquiry was the most material P. could make. If B. admitted the term to be in existence, he must be bound by his admission. He had full notice, and induced P. to lend his money, which was a fraud that would affect the daughter's estate. The term must, therefore, be held to be in force to secure the 3000*l.*, and the trustees must raise that sum and interest.

This, the doctrine in equity as well as at law.

(P) So in *Pasley v. Freeman*, 3 T. R. 51, it was held, that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby he received damage, was good ground for an action on the case in the nature of deceit; and that in such an action it was not necessary that the defendant should be benefitted by the deceit, or that he should collude with the person who was so benefitted. See also, *S. L. Eyre v. Dunsford*, 1 East, 318. *Haycraft v. Creasy*, 2 *ibid.* 92. *Vernon v. Keys*, 12 *ibid.* 632. *Tapp v. Lea*, 3 Bos. & Pul. 367; and *Evans v. Bicknell*, 6 Ves. 174, where Lord Eldon declared, that the case of *Pasley v. Freeman*, and all others of that class, were more fit for a court of equity than a court of law, and his Lordship was clearly of opinion, that at least there was a concurrent jurisdiction; and said it had occurred to him, that that case, on the principles of many decisions, might have been maintained in equity: for it was a very old head of equity, that if a representation be made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false; and this dictum of Lord Eldon's was cited and recognized by Sir William Grant, M. R. in *Burrows v. Lock*, 10 Ves. 475.

And if such subsequent mortgagee apply to a prior incumbrancer, to know if he hath any incumbrance or mortgage on the estate upon which he intends to take a security, and he denies that he hath any, he will lose his priority. *Loss of priority by denial of mortgage;*

But, in this case, it will be necessary for such subsequent mortgagee, or his agent, to inform the prior incumbrancer that he is about to lend the mortgagor money, or otherwise he will not on denial lose his priority; for he is not bound to answer unless he knows of such intention, as the question may be put, merely to satisfy an impertinent curiosity. Thus, where R. had lent money to S. upon a mortgage (l), and I. being likewise about to lend S. money, directed G. to inquire of R. whether he had any incumbrance or mortgage on that estate, who denied that he had, and on a second application returned the same answer; R. acknowledged that G. met him in a public market, and inquired of him what money S. owed him, but denied that G. informed him I. was about to lend S. money; nor did G. on cross-examination, take upon himself to swear he did; the Lord Keeper directed an issue to try whether G. told the defendant that the plaintiff was about to lend money on the estate of S., when he inquired what S.'s debt was (q). *if informed that other sums are about to be lent, but not otherwise.*

And if there be several equitable interests affecting the same estate (m), they will attach upon it according to the re- *Qui priori est tempore potior est jure.*

(l) *Ibbotson v. Rhodes*, 2 Vern. 554. (m) 2 Ves. 477. Ca. Temp. Talb. 68.

(Q) It is remarkable, that Lord Redesdale in his MS. notes to *Becket v. Cordley*, communicated to the profession, through the medium of Mr. Belt's valuable edition of Bro. Ch. Ca. vol. i. p. 357, n. 5. (referring to MS. notes of Lord Talbot for his authority,) should state the decision in this case of *Ibbotson v. Rhodes*, as being reversed. It continues, however, to be cited as an existing authority, see 2 Madd. Ch. 444. Sugd. V. & P. 659, and 1 Fonb. Tr. Eq. 165. And it is observable, that the same doctrine seems to have been laid down in *Amy's case*, 2 Ch. Ca. 128, cited. It would, therefore, be well worth the while when a person is about to lend money on mortgage, and he suspects that another person has a lien or claim on the estate, to make a confidential inquiry of such person as to that fact, particularly observing to state, that a treaty of mortgage is in negotiation between him and the borrower; and then, according to the above doctrine, if the person of whom the inquiry is made, has an incumbrance on the estate and denies it, equity will not afterwards permit him to enforce his demand against the mortgage. *Ibbotson v. Rhodes said to be reversed. Practica.*

spective periods at which they commenced; for it is a maxim in equity as well as at law, that "*Qui prior est tempore potior est jure* (R)."

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This a maxim
in equity, as
well as at law.
But fourth
mortgagee ob-
tains no priority
to third by pur-
chase of second.

So, where Job Smith and Samuel his son mortgaged an estate by feoffment to Winter, and Samuel afterwards died, leaving Elizabeth Smith his heir, who married Thomas Bromwich (n); Thomas took an assignment of the mortgage in the name of Anthony Bromwich in trust for himself. Then Thomas mortgaged the same premises to Elizabeth his sister. Afterwards, Thomas devised these premises to Anthony Abbot, his grandson, and his heirs. At the time of making this will he had two daughters, Anne, married to Robert Abbot, and Elizabeth.—Thomas died, his wife surviving; then she died, and Elizabeth the daughter married Peter Newley. A bill was then brought by Peter and Elizabeth his wife, against Robert Abbot and Anne his wife, Anthony Abbot, and Robert the son of Robert, praying to be let in to a redemption of a moiety, insisting, that Thomas had only a redeemable interest, and no power to dispose of the inheritance; and the court decreed a redemption as to a moiety. This decree was never carried into execution, and Anthony Abbot was permitted to

(n) *Clarke v. Abbot*, Barn. Rep. 457. S. C. 2 Eq. Ca. Abr. 606, and *supra*, 409.

Cases support-
ing doctrine in
text.

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(R) The principle that in all cases where the legal estate is outstanding, the equitable incumbrances must be paid according to their priority, is supported by abundant authority. Vide *Morrett v. Paske*, 2 Atk. 52. *Mathews v. Cartwright*, *ibid.* 347. *Pomfret v. Windsor*, 2 Ves. 486. *Wortley v. Birkhead*, *ibid.* 571. S. C. 3 Atk. 809. *Belcher v. Renforth*, 6 Bro. P. C. 28. *Robinson v. Davidson*, 1 Bro. C. C. 63. *Willoughby v. Willoughby*, 1 T. R. 763. S. C. *infra*, 465. *Morrison v. Parsons*, 2 Taunt. 415. *Knott Ex parte*, 11 Ves. 609, and *Mackreth v. Symons*, 15 Ves. 329, where the doctrine is fully and ably considered by Lord Eldon. It is a common rule, says Baron Puffendorf, in his *Commentaries on the Law of Nature and Nations*, b. 3. c. 8. s. 11, that he who has the precedency in time, should have also the advantage in right; not that time considered barely in itself can make any such difference, but because the whole power over a thing being formerly secured to one person, bars all others from obtaining a title to it afterwards. So in the civil law. *Cum de pignore utraque pars contendit, prævalet jure, qui prævenit tempore*. Dig. l. 2. in fine, l. 4. *Code qui pot*, l. 11. ff. *eod.* and again, *In pignore placet, si prior convenerit de pignore, licet posteriori res tradatur, adhuc potioorem esse priorem*. *Ibid.* l. 12, in f. ff. *qui pot*.

continue in possession until his death. In 1720, Anthony mortgaged the premises to Taylor, and, in 1724, again to Nicholas, and afterwards made several other mortgages to Nicholas, and then died, leaving Anthony his heir at law. Then Peter Newley and Elizabeth his wife, and Anne, who was the widow of Robert Abbot, for divers considerations, conveyed the premises to Robert the son of Robert and his heirs, who afterwards took an assignment of Taylor's mortgage. In this same year Nicholas assigned his mortgages to Clarke. Then Elizabeth the sister of Thomas died, having first made her will and Peter Newley executor thereof, who also died, leaving Thomas Newley executor of his will. Then Thomas Newley assigned all his interest in the mortgage to Clarke, who now brought his bill against Robert Abbot, Anthony Abbot, and Elizabeth Abbot, praying that an account might be taken of what money was due to Robert, on the assignment of the mortgage which was made to him by Taylor, and that the plaintiff might redeem him; and that Anthony and Elizabeth might come to an account as to the mortgages which were assigned to him, and be declared to pay those sums to the plaintiff, together with the money which he should pay to Robert; and, in default, that Anthony might be foreclosed. And the Lord Chancellor was of opinion, that the plaintiff was entitled to relief as far as he could take that relief, within the compass of the former decree; that, if the plaintiff had got the legal estate either himself, or in a trustee for him, so that he could have brought an ejectment, and put the defendants to have been plaintiffs here, it might have deserved consideration, whether these defendants would have been entitled to have redeemed the present plaintiffs; but, as the plaintiff had not the legal estate, and was forced to come into equity, he must submit to be redeemed by Anthony Abbot, and could put no other terms upon his redeeming him, than such as fell within the compass of the former decree. His Lordship said that "*Qui prior est tempore potior est jure*," was a rule that held in equitable as well as in legal rights. That, in this case, Robert had the first equitable right, and therefore his mortgage must be paid off in preference to that of the plaintiff. It was true the plaintiff had taken in the mortgage made to Elizabeth, the sister of Thomas, which was prior to Taylor's mort-

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gage under which the plaintiff claimed, but he had no legal estate, for want of taking in an assignment from Anthony Bromwich, or at least for want of having him before the court in order to have a conveyance; and therefore Robert, who had the assignment of the mortgage which was made to Taylor, previous to any assignment of the mortgage which Clarke took, must be preferred to him: and his Lordship said, that it was never determined that a *puiſne* mortgagee could protect himself against a prior mortgagee, by purchasing a mortgage previous to his, where there was no legal estate in that mortgagee from whom he took his second assignment, especially without bringing the trustee of that mortgage before the court.

Among equal
equities there is
priority, but
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the most equity
preferred (s).

But this general rule admits of an exception if any one of the parties hath more equity to call for the legal estate than the others; for he that hath more equity shall be preferred (o).

(o) *Pomfret v. Windsor*, 2 Ves. 486. nized and acted on by Lord Manners,
Wilkes v. Bodington, 2 Vern. 599. in *Hedlicot v. O'Donnell*, 1 Ball & Bea.
[S. C. post, 604, et vide S. P. recog- 171.—Ed.]

Value of equi-
ties, how deter-
mined.

(S) The value of equities is determined by ascertaining who has the best right to call for a conveyance of the legal estate. Thus, in *Blake v. Hungerford*, Pre. Ch. 158, one A. who was seised in right of his wife of the manor of D., procured his wife to join with him in a fine, by way of mortgage in fee, for securing 15,000*l.*: the equity of redemption of which, on payment of the money, was limited to A. for life, with remainder to the wife in fee. A. afterwards acknowledged a statute for 500*l.* to J. S., and then the wife died, leaving B. her son and heir. A. contracted with B. his son, who had no notice of the statute, to sell him his estate for life in the manor of D. for 3000*l.*; and accordingly B. the son, thereupon procured 3000*l.* more to be taken up on the mortgage, and the mortgage to be transferred to the new mortgagee, who paid off the old mortgage and furnished the 3000*l.* to A. The equity of redemption was limited to the son, who covenanted to pay the money; and the mortgagee's covenant on payment of the money was to assign to him, or as he should direct. B. the son then acknowledged a statute to one Mellish (who had no notice of the 500*l.* statute); and afterwards made his will, and devised legacies to the plaintiffs, charged on the said manor, and devised the manor itself to his father in fee. The question was, whether J. S., who had the statute, which was acknowledged by A. while he was tenant for life, should be preferred in payment to Mellish, who was the donee of the statute given by B. the son after the purchase of his father's life estate. The Master of the Rolls decreed,

Thus, where the defendant acknowledged the money was *One having statute at law, and mortgage in*

that Mellish should be paid before J. S. ; and this decree was affirmed by Lord Keeper Wright, with the assistance of Blencow, J. and Trevor, C. J.

The reasons urged for it were, that though neither had the legal estate, and that as between two equities *qui prior est tempore potior est jure* was the rule, yet that must be understood of bare equities only ; but, in this case, B. had more than a bare equity by his purchase of A.'s equitable life estate ; the whole interest was united in him, and they who had the legal interest covenanted to assign to him, and were but his trustees after payment of the mortgage money ; and it differed little from the common case where a third mortgagee bought in the first mortgage in trust for himself ; and B. might make use of his trustee's name at law either to defend or recover, and might have an action at law against them to assign. That though A.'s equity for life would have entitled him on payment of a third part to redeem, and the 500*l.* statute was a charge upon that equity, yet that was liable to be defeated by a subsequent incumbrancer without notice ; but such purchaser must not be a purchaser of a bare equity only, for then the first would prevail. But B. was a purchaser of A.'s equity and the legal estate together, and would have the protection of the legal estate. That his deed of purchase took notice of the case, and that the mortgage was assigned at his instance, and by his procurement ; and so he purchased the benefit of the legal estate together with the equity. That if a third mortgagee took only an agreement of the first mortgagee to convey to him, the second could not, in such case, compel him to assign to him, because such assignment was no more than what they might have done without any agreement ; and that in this case B. was not entitled on the old equity of A., but on the new equity raised on the new mortgage : and he was an absolute purchaser of the estate, subject to the mortgage, and must have the protection of it.

Rule qui prior, &c. applicable to bare equities only.

The superiority of right amongst bare equities is regulated, it is true, by the axiom *qui prior est tempore potior est equitate* ; but the person who has the legal estate in a portion of the property, has a better right to call for a conveyance of the legal estate in the remainder, than a person who has a mere equitable title in the whole ; but if one party have no more equity than the other, the law, it seems, must take place ; and therefore where it is voluntary conveyance against voluntary conveyance, it must be tried at law. Lord Redesdale, on this head, remarks, in his Trea. on Plead. p. 215, "Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side." Et vide *Goodwin v. Goodwin*, 1 Ch. Rep. 92. 173, 2d ed. and Francis's Maxims, Max. 14, where the cases illustrative of this rule are classed. It is also observable, that equity views the incumbrancer, who has the best right to call for the legal title, in the same light as if he had procured an actual conveyance or assignment of it. Thus, in *Knott Ex parte*, 11 Ves. 618, (citing *Maudrell v. Maudrell*, 10 Ves. 246. S. C. 7 *ibid.* 557) Lord Eldon declared, that a court of equity was bound to hold not only that the

Equal equities decided at law.

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Mortgagee entitled to legal estate considered as if he had it.

equity preferred to mort-

not paid by him for a statute purchased in to cover his mort-

first mortgage should be protected as it was the first equitable security, but that the mortgagee having a better right to call for the assignment, should in equity be considered in the same state as if he had it. This doctrine, however, has received very considerable qualification in the lately decided case of *Frere v. Moore*, 8 Price, 475, presently stated, but it should be borne in mind that the rule here noticed does not militate against the instance presently adduced of the puisne mortgagee's being allowed to avail himself of the legal estate which he has acquired, in preference to the mesne incumbrancer.

Illustrations of preceding rules.

On these principles it follows, that the first equitable incumbrancer, where the entire legal estate has not been got in, will have the best right to call for an assignment of it to himself. So, if there be a term outstanding, the first mortgagee, who has the legal estate in the reversion, will have the best right to call for an assignment of the term; and equity will give it him in preference to the second incumbrancer. *Willoughby v. Willoughby*, 2 Ves. 684. The language of this case, as reported in 1 T. R. 763, is remarkable. It is there laid down, that if a subsequent purchaser or mortgagee have notice of a former purchase or incumbrance, he will not be allowed to avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference: but if he have no notice of such prior purchase or incumbrance at the time he lent his money, or contracted for the estate, and has the first and best right to call for the legal estate, then, if he gets an assignment of it, a court of equity will not deprive him of his advantage; and that if a second mortgagee lends his money on an estate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances on the estate, although such other incumbrances were not known to the second mortgagee at the time he advanced his money. Other points in this case of *Willoughby v. Willoughby*, are reported by the learned author from MS. notes, post, 496. In a case determined by Lord Cowper, where the trustees of a term joined in a conveyance to the purchaser, not conveying the term, but making themselves parties, (which was considered as a declaration that they would hold for that purchaser,) a subsequent purchaser endeavoured to obtain a conveyance, but was not permitted, as upon the foot of the contract the trustees had given the other a better right to call for the legal estate. This was cited and acknowledged as good law by Lord Eldon, in *Maundrell v. Maundrell*, 10 Ves. 270.

Second mortgagee obtaining legal estate preferred.

It may also here be in order to remark, (though it rather anticipates what will be found more at large in the sequel of this chapter,) that if a *bond fide* mortgagee, who has lent his money honestly without notice of a prior incumbrance, shall obtain a conveyance of the legal estate, or an assignment of a judgment or statute affecting the legal estate, a court of equity will not take it away from him for the benefit of the mesne incumbrancer, without that incumbrancer will pay the mortgagee so obtaining the legal title, his principal, interest, and costs; for though the second or mesne incumbrance be prior to the subsequent incumbrance in point of time, yet it furnishes merely equal equity with the subsequent incumbrancer, who having by greater diligence obtained

gage, but offered to pay it on the assigning the extent (*p*); it was urged, that *puisne* mortgagees were, in such case, pro-

gages in equity only. Semb.

(*p*) *Wyndham v. Richardson et al.* 2 Ch. Ca. 213. [*S. C.* post, 497.—*Ed.*]

the legal estate, will be allowed to retain his advantage. And it may be useful to recollect, that notice of the mesne mortgage or incumbrance, at the time of obtaining possession of the estate at law, will not be material. If, however, notice of the mesne incumbrance can be proved on the *puisne* mortgagee at the time he advanced his money, as distinguished from the time he obtained such legal protection, equity will not allow him the shelter of his legal title; for notice will make him come in fraudulently. See 2 Ves. 684. *Taylor v. Baker*, 1 Daniel, 71, and post, vol. ii. 573, 4, *in notis*. So also if he obtain a conveyance of the legal estate after a decree to account, equity will not allow any priority to be acquired by such a conveyance, as we shall hereafter see, p. 553, post.

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Since the last edition of this work, two other cases have been decided on the doctrine here discussed, one of which it is necessary to go into somewhat at length.

In the *first*, a person made a mortgage in fee, and the mortgagee omitted to take an assignment of an outstanding attendant term, on the ground that the term would attend the inheritance in him. It afterwards turned out, that the mortgagor was only tenant in tail, and the mortgage was not made by recovery. The court held, that although the term could not attend the fee in the mortgagee, because he had not the fee in him, yet being a purchaser, he was not to be deprived of the benefit of the term because it could not actually attend. *Buckingham v. Hobart*, 3 Swanst. 201.

Mortgagee from tenant in tail without recovery obtaining term, preferred.

The *second* case is one of more general importance, as it tends to overturn the doctrine of my Lord Chancellor in *Knott Ex parte*, as also to impeach the very fair inference to be drawn from *Maundrell v. Maundrell*, *ubi supra*. The facts of the case alluded to are very incoherently stated by the reporter, but they are in some measure supplied by the judgment of the court, and are also very succinctly given by Mr. Patch, in his work on the same subject as this Treatise, App. 448. For the purposes of this note it will be sufficient to state, that one Bird held a renewable leasehold estate in trust for Moore. By indenture, dated May, 1813, between Moore, Frere (the mortgagee), and Bird,—Bird covenanted with Frere to stand possessed of the premises for securing to Frere the re-payment of 2900*l.* and interest, and subject thereto in trust for such persons as Moore should appoint. By another indenture, dated 1816, between Moore, Hudson (a second mortgagee), and Bird,—Moore appointed the premises, subject to the sum of —*l.* (for which a blank was left) due to Frere, to Hudson, for securing 1200*l.* and interest. By another indenture, dated February, 1817, between Moore and Frere,—Moore appointed that Bird should stand possessed of the premises in trust for securing to Frere the payment of the further sum of 2162*l.* being a sum which consisted in part of Frere's own money, and in far the largest part of money due from Moore on bond to another person, and for which other person Frere was executor.

Person having best right to call for legal estate obtains no priority unless he actually procures an assignment of it.

On these facts Frere filed his bill, praying that he might be entitled to tack his two securities together, and to be paid both sums in preference to Hud-

tected against a former mortgage on this reason only; because they were entitled in equity, by actually laying out their money

son. He relied mainly on the judgment of Lord Eldon, in *Knott Ex parte*, 11 Ves. 618, where his Lordship expresses himself thus:—"I shall not go through all the doctrine which I examined with great jealousy in *Maundrell v. Maundrell*, as that was the first case of the class that occurred while I have sat here furnishing a great principle. I shall only observe now, that when such a point as this comes to be discussed, if the legal estate has not been got in, it must be considered with reference to the question, whether the first incumbrancer has a better right to call for an assignment of the legal estate, and from that circumstance a court of equity is bound to hold, not only that the first mortgage shall be protected, as it was the first equitable security, but *that mortgages having a better right to call for the assignment, is in equity in the same state as if he had it.*"

The Lord Chief Baron (Richards), after time taken to consider, delivered his judgment, from which the following are extracts:—"Beyond all question, Hudson had distinct and *full notice* of the existing security to Frere. The consequence of that would be, that if he had afterwards obtained possession of the legal estate, he never could have made any use of it against Frere, to the extent of his security. It has been urged, that Hudson having such notice, was guilty of laches in not making inquiry as to the real amount of the mortgage; more especially as there was a blank left, and that blank might be for any sum to any amount. I do not think that argument so well founded as that of the party having had due notice; for it must be remembered, that if he [Hudson] had inquired of Frere what was the amount of his security, supposing he were bound to inquire, and to have ascertained the amount secured to Frere by the deed of 1813, Hudson would have had no further information, than that 2900*l.* with interest to a certain period, was then due to him. Much was said of the deeds being in the custody of Frere; but that was surely the proper custody, and Hudson having had due notice of a security existing, which he certainly had, was equivalent to notice of every thing else. Then the deed of 1817 was executed in favor of Frere for several sums, making together 2162*l.* Some of those sums were due to Frere, the plaintiff, as the executor of his brother and sister. 1696*l.* was due to the plaintiff himself upon two bonds, and a small sum of 23*l.* was due to him on the balance of an account. At that time there was nothing that bears any thing like an appearance of a *lien* on the land [for these sums]. The highest security is a *bond*. Now the question is, whether the plaintiff is to tack together his two securities, and that is the main question in this cause. Neither of these parties has got in the legal estate, and each of them, in my view of the case, has an equal equity. The defendants [there were several besides Hudson] were all honest incumbrancers, having money due to them. The plaintiff was also an honest mortgagee for 2162*l.* in addition to the former security of 2900*l.* and interest. Hudson was also an equally honest mortgagee, and no laches can be imputed to him, because, when he advanced his money, there was nothing more due to Frere than 2900*l.* with interest. I have never yet heard, that when a person is about to advance money on any

Of tacking subsequent bond to mortgage against intermediate mortgagee, where both parties have equal equity.

on their mortgage, and were entitled in law by purchasing in their former incumbrance: and so having a title both in law

security, that he is to give notice of it to another who has previously advanced money on the same property, requiring him not to advance more money, because he is also about to advance money to the owner of the same estate, yet that is the only notice which could have been given by Hudson to Frere. Was Hudson bound, when he was about to advance 1200*l.* to Moore, to ask Frere whether there was more money due him? And because he did not, is Frere to consider whatever is due to him on an after security, as if it were due on a prior security? In the opinion of the Lord Chief Baron, the subsequent mortgagee was not bound to tell the prior incumbrancer that he, knowing that 2900*l.* and interest was due to him, was about to advance the mortgagor more money; and that really seems to be the only notice these mortgagees could have given to Frere. All the parties, therefore, seem to have equal equities in point of honesty, in the several transactions. Neither of them has the legal estate; and therefore they all stand on an equality in point of equity. The rule therefore must prevail, *qui prior in tempore, potior est in jure*; for as neither of these parties is possessed of the *tabula in naufragio*, neither has *priority of right*; and therefore the priority in point of time must have the preference; consequently the security given in 1817, must be postponed to that of 1816.

“It was however contended,” continued the learned Judge, “that the covenant of Bird, to stand possessed of the legal estate for the plaintiff, is to be considered as tantamount to an assignment of the legal estate. That is certainly a point on which much stress was fairly laid, and it is a question in the case which requires attention. By that covenant it is clear, that Bird became a trustee for Frere; but Frere did not thereby acquire the legal estate. Then it was said, that Hudson had notice that Bird was trustee for Frere, and was bound by it. He had notice, certainly, of a charge; but then it was only to the extent of 2900*l.* and interest. The legal estate, meanwhile, continued in Bird, and was not assigned to Frere. Then the question is, whether this covenant to stand possessed, gave the same advantage to Frere as if he had an actual assignment of the legal estate. There is no doubt that Frere had originally the first right as between him and Bird; but what is the effect of that? I take it to be clear, that if I agree to purchase an estate, and take a contract or covenant that the owner will sell that estate, and should he sell or mortgage it to another person who has no notice, I, the first purchaser, cannot avail myself of any right to call on him for the legal estate; and, if the second purchaser can get in the legal estate, he may thereby protect himself. The person, therefore, who might have first called for the legal estate, unless he does so, has no advantage against another who gets in the legal estate, though the title of this latter person be *posterior in tempore*. If there had been no covenant on the part of Bird, and Frere had come here, and filed a bill against Bird, and Moore and his wife, to compel them to perfect his security by a good legal conveyance, Frere would have been entitled to a conveyance; but he did not do so. If one has a right to obtain a conveyance of the legal estate, but does not avail himself of it,

Covenant to assign legal estate not equal to assignment.

Mortgagee of legal estate without notice between contract for purchase and conveyance obtains priority.

and equity, he that had only a title in equity should not prevail against both. But the defendant had no title in law;

another may get the legal estate if he can. It is a well known rule in courts of equity, where equities are equal, and they proceed invariably on that maxim, *qui prior in tempore, potior in jure*.

"The case of *Maundrell v. Maundrell*, which has been cited, certainly is a case which one cannot read without admiration and respect. Great talents and learning are displayed throughout both by Sir William Grant and the Lord Chancellor. That, however, is not a case which applies to this point. It was a case of dower. It is an anomalous judgment on a question of dower, as distinguished from a mesne incumbrance in respect of notice, and it decides simply this, that if the legal estate, under a term anterior to the right of dower, be outstanding, the purchaser will have the benefit of that term, if assigned, although he has notice of the right of dower. The case *Ex parte Knott*, we were also referred to, where there is a dictum of the Lord Chancellor that was very properly much pressed; but it does not decide it. He says, 'Before I could decide that question in bankruptcy, a jurisdiction in which there is no appeal, I must be satisfied that there was no danger of error.' He does not therefore decide it; he only throws it out in the fullness of his learning as a matter for consideration. If the Lord Chancellor had so determined, of course I should be bound to pay great attention to his authority.

Covenant to stand possessed of legal estate not equivalent to assignment.

"In this case, the legal estate outstanding, must be held to be in trust for the benefit of the plaintiff, to the extent of one security; another person has advanced his money on the security of the same estate, and then the first mortgagee advances more money on a subsequent mortgage. Both of them have equal equities beyond all question; and neither of them has the legal estate; for the covenant to stand possessed does not make any difference. The case of *Barnett v. Weston*, 12 Ves. 130, was cited. That was a decision of the Master of the Rolls, and was probably well decided; but as that was a case of very different circumstances, I do not think myself called on to enter into any disquisition on it." Judgment was accordingly given, that Frere was not entitled to preference in respect of his second advance, and that he could not tack such further advance to his mortgage as against Hudson the second mortgagee. *Frere v. Moore*, 8 Price, 475. S. C. Patch Mortg. 498.

Of second mortgagee giving notice of his loan to the first.

It will be observed in the above case, that the Lord Chief Baron considers the law to be, that a second mortgagee is not bound to give notice to the first mortgagee of the second incumbrance. He certainly is not bound to do so, but it is submitted, that such a notice would be a very proper precaution. If the first mortgage be of the legal estate, then it is clear that any subsequent advance might be tacked to the prior mortgage as against a mesne mortgagee if the first mortgagee at the time he makes such further advance has not notice of the mesne incumbrance. If, however, the second mortgagee had given the first mortgagee notice of his incumbrance immediately on its completion, the first incumbrancer could not tack any subsequent advance to his mortgage, as against the second mortgagee after such notice. The above case has decided, that if the first mortgagee has only an equitable security,

for, though the statute was extended, yet it was not assigned to him, he not having paid for it, and the plaintiffs offered to discharge him of that. But the Lord Chancellor was strongly against them on this point.

Another ground of exception to the general rule above referred to, is suggested by Lord Talbot in the case of *Tourville v. Nash* (q), where two executors, being also residuary legatees, one of them for a valuable consideration assigned over part of his residuary share to A. B. and then for a valuable consideration likewise assigned over his whole residuary share to the other executor and residuary legatee, who, as it was said, had no notice of the former assignment; whereupon it was insisted, that this legacy of the surplus was a *chose* in action good only in equity, and not at law, in which case the assignment which was prior in time, must take place, consequently that made to A. B. would prevail. To which it was replied, that though a legacy were a *chose* in action, yet when it was assigned to an executor,

And the rule applies to assignments of choses in action, for there no legal estate passes; as if one assign part of his legacy to A. and then the whole to B. who has no notice of former assignment (T).

(q) 3 P. Wms. 308.

he cannot tack a subsequent advance to his first mortgage, even if he has no notice of the mesne incumbrance. It is difficult to conceive how a second mortgagee can advance his money without investigating the title. To do that he is brought in immediate contact with the prior lender, who has, or ought to have, the title-deeds. The inquiry of him should be, for what purpose he holds the title-deeds to another man's estate. Having declared his mortgage, it should then be inquired, whether he has made any subsequent advance, or has any other lien on the estate, observing, at the same time, that these inquiries are made with a view to a second loan. If the first mortgagee fails to reveal the true state of his incumbrances, he will be postponed for all that he does not disclose. See a few further observations on the consequences of the doctrine in this case, *infra*, p. 524, and 558, where it is stated, generally, that no tacking is allowed as between equitable incumbrancers.

(T) On the mortgage of a *chose* in action, it should never be omitted to give notice of the transaction to the trustee, for upon the authority of the case quoted in the text, and *Stanhope v. Verney*, Butl. Co. Litt. 290 b. n. (1), s. 15, it has been thought (and indeed as it should seem with a great degree of reason), that if a mortgagee of this equitable right neglect to give notice of his incumbrance to the trustee, and such equitable right be afterwards assigned to a second mortgagee, who takes the precaution of giving the trustee proper notice, the first mortgagee will be postponed. See also *Ryall v. Rowle*, 1 Ves. 367, and *Jones v. Gibbons*, 9 *ibid.* 410.

Mortgagee of chose in action giving notice to trustee, preferred.

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he, having a remedy at law, was in a different situation from a third person. But Lord Talbot said, that he did not see any difference; for the thing assigned was still but a *chose* in action, which the executor himself could not come at, unless by action or suit, either in law or equity; but his Lordship farther observed, that it seemed, if it had been a *mortgage* made to the testator, and assigned by one of the executors to the other, the latter might have entered; but in the principal case, the assignment was but of 1200*l.* due upon all the mortgages made to the testator from A. B. the father, and to A. the son, which, not being recoverable otherwise than by a suit in equity, was clearly a *chose* in action.

Amongst equal equities, the one to which the legal estate is annexed, preferred.

It is a rule in equity, that, where several persons have equal equity, he amongst them that hath possession of the *legal estate*, may make all the advantages of it of which the law admits, and thereby protect his title, although it be subsequent in point of time; and his adversaries shall have no help in equity; for it will not *disarm* a purchaser, but where the equity is equal, will leave the law to prevail.

Mortgagee lending money without notice of prior incumbrances, and acquiring legal estate, preferred.

Therefore, if there be several mortgagees, the last mortgagee, having lent his money upon a valuable consideration, and *without notice*, may, by purchasing in the precedent incumbrance, *which carries with it the legal estate* (U), protect himself against any mortgagee subsequent to the first and prior to the last (W); for then he will have both law and equity upon his side (r).

(r) *Bovey v. Shipwick*, 1 Ch. Ca. 1 Vern. 187, 188. 2 Ves. 573. *Hagshaw v. Yates*, Stra. 240. *Churchill v. Grove*, *ibid.* 35.

Prior incumbrance defective at law, not available.

(U) Such incumbrance being attended with all the requisites to make it available at law; for otherwise, it is conceived, it will not prejudice the intermediate incumbrance; as if it be a judgment, that it be duly docketed; or a recognizance, that it be duly inrolled; or a deed in York or Middlesex, that it be duly registered, &c.

(W) Though he purchase in the incumbrance after he have notice of the second mortgage, or a bill be pending by a mesne incumbrancer against the first for redemption of his security. The language of the court in *Churchill v. Grove* is, "that it was the constant practice of the court, if a purchaser *bonâ fide* did buy in an eigne incumbrance, statute, or judgment, and there

This privilege of protection, by purchasing in prior incumbrances, originates in the particular constitution of the legal jurisdiction of this country (s). It could not happen but where the administration of law and equity was divided among different courts, and created different kinds of rights in estates; and is grounded upon that force which courts of the latter description necessarily and rightly give to the common law and to legal titles. For although they break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates, when not urged to do otherwise by those motives; and, consequently, where there is a legal title and equity on one side, and equity only upon the other, they will never suffer the side, in which both these rights concur, to be hurt by that in which one of them only is to be found (x). Reason thereof.

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Thus, where S. having granted a rent charge for 2000l. to H., mortgaged the premises for 1200l. to C. and afterwards, those that had C.'s interest, he being dead, brought in a judgment, rent-charge, mortgage, mortgagee purchasing judgment, preferred (y).

(s) 2 Ves. 574.

were a judgment or statute mesne between that and his purchase, of which he had no notice at his purchase, that he should protect his purchase with the eigne incumbrance so bought in; and that though judgments were on record, and a purchaser was bound to take notice thereof at law, yet in equity, where the cognizee of a judgment comes to be helped to extend his judgment against a purchaser, he must shew express notice of the judgment in the purchaser, or else shall never be relieved against the purchaser." Et vide Hardr. 172.

(X) But the potent effect of the legal estate will not make up for the want of equal equity. Thus, if A. and B. have equal equity, and B. the legal estate, the latter will be preferred according to the law in the text; but if B. have unequal equity, as for instance, if he have notice of A.'s claim or mortgage before he takes his security, then the legal estate which B. may afterwards acquire, will not be of any avail; for, notwithstanding he may have obtained the legal estate, yet he will not have the same claim to the protection of a court of equity as A. has, since notice makes him come in fraudulently; and if a man will lend his money with notice of another's equity, he does it voluntarily and of his own accord. Such an act is also, in effect, tantamount to an acknowledgment that the lender will claim subordinately to the person of whose right he is apprised; and, therefore, it is good in equity to bind him to the choice he has made, with full warning of the consequences. See post, 527. Unequal equity not balanced by legal estate.

(Y) See qualifications, in p. 455, post.

ment precedent to the grant of the rent-charge (t); H. exhibited his bill to discover what estates C. claimed, and charged that C. had notice of H.'s rent-charge before he took the mortgage. The defendants pleaded the mortgage to C., and that afterwards hearing of precedent incumbrances, they bought in a legal title prior to the plaintiff's, and offered to assign all to the plaintiff, if he would pay what was due on the mortgage and on their new-acquired title; but, if he would not, they insisted that they ought not to be obliged to discover what that estate was they had bought in; and that their title ought not to be drawn under examination in equity; and, by way of answer, they denied that, to their knowledge and belief, C. had any notice of the rent-charge when he lent the 1200*l.* which plea, on debate, was allowed to be good (z).

This point was fully settled in the following case by a solemn determination by Lord Hale, who gave it the name of the "*creditors tabula in naufragio*."

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Third mortgagee without notice of second, buying in first mortgage and judgment, preferred to second mortgagee (A).

There E. being seised of the manor of W., and of the manor of M. mortgaged part of the manor of W. to B., in

(t) *Higgon v. Callamy et al'*. vide 1 Ch. Ca. 149, et vide *Churchill v. Grove*, *ibid.* 35. S. C. Nel. 89. this case, as stated 2 P. Wms. 493.

Mortgagee protected by old satisfied statute.

(Z) And a satisfied statute will confer the same protection as a judgment and even more, as we shall see in the next page. In *Stanton v. Sadler*, 2 Vern. 30, the plaintiff was a jointress and the defendant a mortgagee subsequently to the jointure. The defendant had procured an assignment of a statute which preceded the jointure, but which was satisfied. This statute he extended on the lands mortgaged. The bill was to set aside the extent, for that the statute was satisfied; and whether a satisfied statute should protect the mortgage, or be set aside without payment of the mortgage money, was the question? The Master of the Rolls decreed, that upon the plaintiff paying the mortgage money, with interest and costs, the defendant should assign all his securities to the plaintiff. But his Honor would not set aside the extent, without the parties would engage to pay off the mortgage money.

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Civil law allowed third mortgagee to over-reach second by purchase of first.

(A) The squeezing out, as it is termed, of the second mortgage, has been deemed a hard rule. See the observations of the Master of the Rolls in the next note. But it was admitted and sanctioned by the civil law, and seems to have prevailed in almost all countries where the code of Justinian has been

1649, for 1000*l.* (u), and, in 1655, acknowledged a statute to B. of 8000*l.* for the payment of 400*l.*: afterwards, in 1665, E. mortgaged both these manors to D. for 7000*l.* and then, in 1605, mortgaged the manor of W. to L. for 2000*l.* L. *having no notice of the former mortgages.* L. coming to have notice of the mortgage to D., purchased in the two incumbrances to B., and then W., executor of D., sued L., who pleaded the whole matter; and the court held, that L. might make use of these incumbrances to protect his own mortgage, he having both law and equity for him. First, he had law, for *that* he had a precedent mortgage in 1649, and also the statute in 1655, and while these remained in force, M. could not come in. Secondly, he had equity, for, though he had a subsequent mortgage, yet it being without notice, he ought to be relieved in Chancery (B).

(u) *Marsh v. Lee*, 3 Vent. 337. *Pask*, 2 Atk. 52. *Brace v. Duchess of S. C.* 1 Ch. Ca. 166. [172. See also *Marlboro'*, 2 P. Wms. 421. 495. Pre. S. L. *Anon.* 2 Freem. 6, pl. 14. *Edmonds v. Povey*, 1 Vern. 187. *Moret v. Ed.* Ch. 240. Mose. 50. Bac. Tr. 55.—

received. *Plane cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate, quam superiori exsolvit.* Inst. lib. 16, qui pot in pign. Vin. lib. 11. s. 4. lib. 12. s. 9. So the learned French professor Domat states the civil law to be, that he, who being already a creditor, pays off another creditor of the same debtor, who is prior to himself, succeeds to his mortgage, although he may have made no such agreement, nor received any substitution. For his quality of creditor makes it to be presumed, that he pays him who is a more ancient creditor, with no other view than that he may succeed in his place, and thereby secure his own debt; which distinguishes his condition from him who having no such interest, pays a debt for the debtor without substitution, and of whom it might be said, that perhaps he was under an obligation to the debtor to pay for him. See 1 Domat C. L. §80. s. vi. But the Roman law did not allow this preference to be gained by a purchase of the first mortgage after it was satisfied, for *si dominus solvit pecuniam, pignus quoque perimitur.* Inst. lib. 13. s. 2. *de pign.* Consequently a purchase of the first mortgage after the same had been discharged and an acquittance granted, was a mere nullity, for the right of the creditor being extinguished by the payment, he could not make over to another what he had not any longer, nor substitute him to a right which was extinct.

Provided first were not satisfied.

(B) The Master of the Rolls, in *Brace v. Marlborough*, ubi supra, after considering the cases and precedents, observed, that if a third mortgagee bought in the first mortgage, though it were pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he

Rule acknowledged.

Mortgagee purchasing judgment can attach but a moiety,

But there is a distinction between the effect of purchasing in an outstanding judgment and purchasing in a statute; for

Hardship of doctrine.

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Second mortgagee files bill against first and third, first submits to be redeemed by second, yet assigns to third pendente lite, assignment good.

should thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called "a plank" gained by the third mortgagee, or *tabulam in naufragio*, which construction was in favor of a purchaser, every mortgagee being such *pro tanto*. But though the rule in equity had been so settled, it was not, however, without great appearance of hardship; for it seemed but reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money, that the land was of sufficient value to pay the first mortgage, and also his own, and to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first and third mortgagees, was a great severity. But his Honor admitted that it had been so settled on solemn debate, in *Marsh v. Lee*; but that, though it was so settled, he saw no reason to carry it further, to a case not within the same reason—to a case where the lender of the money did not advance it on the credit of the land, as mentioned in a subsequent page. See post, 526.—Lord Eldon also, in a recent case (*Mackreth v. Symmons*, 15 Ves. 335), evinced a disposition to circumscribe the rule, when he inquired whether there was any case where a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second. This query of his Lordship's is observed upon in a subsequent note. See post, 541, in *notis*.

The case of *Marsh v. Lee* has uniformly been recognized and acted on from the time it was decided to the present period. If it were wanting in authority, it received the fullest acknowledgment in the following adjudication of *Belchier v. Butler*, 1 Eden Rep. 523. 1760. In that case there were five mortgages. The mortgagor was an attorney, and the first mortgagee his client, who, relying on the promise and integrity of his attorney (in whom he placed great confidence), was prevailed on to re-deliver the title-deeds and writings relating to the estate pledged to the mortgagor, on an assurance that they should be shortly returned. The mortgagee several times afterwards applied to the attorney for re-delivery of the deeds, and he often promised that he would return them, but never did. This accounted for the number of mortgages on the estate. The fifth mortgagee (who had a mortgage and further charge, both dated the same day) had no notice of the prior incumbrances; and, on the completion of his treaty, the whole of the title-deeds relating to the premises were delivered to him. The mortgagor dying, the third mortgagee filed a bill against the devisee of the equity of redemption and the other four mortgagees, praying that they might severally set forth their interests in the premises, together with their securities, and how much was due thereon, and how their debts arose; and that the defendant Renforth, who was the last mortgagee, having the deeds, might set forth what interest he claimed therein, &c. The defendant Pace, the first mortgagee, set forth his mortgage, and what was due to him for principal and interest, and on payment thereof he submitted to assign his mortgage to the plaintiff, or as he should direct. The defendant Renforth pending this cause, in order to strengthen his title and to gain a priority, paid off all principal and interest due to the

the mortgagee can procure to himself, by taking in such security, no protection beyond the interest to which the owner of

but if he purchase a statute, he may attach the whole if statute be first incumbrance.

defendant Pace, the first mortgagee; and, by indentures of lease and release, Pace, in consideration of the monies due to him, conveyed the premises to Renforth, his heirs and assigns for ever, subject to the proviso of redemption contained in the original mortgage. The question therefore was, not whether Renforth could buy the security *pendente lite*, but whether Pace, by the submission contained in his answer, had not prevented himself from assigning over his mortgage to Renforth with a clear conscience and unlimited right. The Lord Keeper Northington said it was then near a century since the doctrine was first settled upon long argument and mature deliberation, that a third mortgagee having lent his money without notice of a second, may, by paying off the first, hold the estate against the second till he has been paid what is due to him upon both. This was what Lord Hale called the *tabula in naufragio*; and it had continued to be the practice ever since without any variation. A second mortgagee, therefore, when he lends his money on an equity of redemption, is aware, or ought to be aware, that he is liable to be postponed by the subsequent incumbrancer getting an assignment of the first mortgage; and a second incumbrancer confiding in the notoriety and certainty of this rule, is induced to buy in the first incumbrance at a new expence. The principle on which this doctrine was first established, and had ever since prevailed, had been very correctly stated at the bar. For the third mortgagee having innocently lent his money without notice of the existence of the second, had, in conscience, as good a right to receive the whole money he had lent, as the second mortgagee had to be paid what he might have advanced; and then by the assignment of the first mortgage and the possession of the title-deeds, he obtained both law and equity on his side; and against that a court of conscience would not interpose to strip him of his protection.

Second mortgagee should immediately buy in first incumbrance.

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This rule of equity, continued Lord Northington, required no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it was by lending the money, without notice, that he became an honest creditor, and acquired the right to protect his debt. But he was not compelled to look for this protection till his debt was in danger of being prejudiced; and therefore when that danger was first discovered to him (whether it were by a suit in equity, or by extra judicial means), as the honesty of his debt was not affected by the discovery, so the right of protecting that debt and the efficacy of such protection were not prejudiced. Hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*. But it was said that Pace, by the submission in his answer, had precluded both himself from assigning to Renforth, and Renforth from purchasing from him. But Lord Northington was of opinion, that, upon the principles which he had stated, the answer of Pace could in no way be considered as affecting the conscience of Renforth. His Lordship thought that the submission taken in its fullest extent could only bind the right of the person submitting, and could not be considered as extending to those of subsequent incumbrancers. This right of protection was not claimed by the third mortgagee as derived from the first, but arose from his personal situation, and

Principle of rule that legal estate may be purchased *pendente lite*.

Acts of first mortgagee not to affect subsequent incumbrancers.

the security, taken in, is entitled; therefore, as a judgment creditor can extend but a moiety (c), a judgment will protect but a moiety in the hands of his assignees; but if the first incumbrance be a statute staple, which attaches upon all the land of the cognizor, a subsequent mortgagee, buying that in, may hold all the land, and thereby protect himself, until at law the cognizor of the statute, by a *scire facias ad computandum*, has got the statute vacated, which can only be upon payment of the penalty; for equity will not, in such case, give any

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continued.

attached originally to himself the moment he obtained the legal interest in the estate. But suppose this submission, instead of having been made by the first mortgagee, had been made by the third, could it have had the effect which was contended for? The rights of the mortgagees were not altered by turning the mortgaged estate into money; for the court directed the money to be applied according to the rights of redemption. Therefore, if the second mortgagee had no right to redeem the estate till he had paid what was due upon the first and third mortgages, he would of course have no right to partake of the money till their claims were settled. Lord Northington was therefore of opinion that Renforth, by virtue of the assignment of the defendant Pace's mortgage, was entitled to hold the premises till he was paid the money due on his three several mortgages; and this decree was affirmed in Dom. Proc. 9th February, 1764. 5 Bro. P. C. 292. Toml. edit. 6 ibid. 28. edit. 1784.

Third mortgagee with notice of second, buying in first, obtains no advantage.

In conclusion it may be remarked, that if a third mortgagee, having notice of the first and second incumbrances at the time of lending his money, purchases in the first mortgage, which carries with it the legal estate, the second mortgagee may nevertheless redeem him on payment of the principal money and interest of the first mortgage only, without regarding what the third mortgagee actually advanced; for although such third mortgagee may have the legal estate, yet he has not equal equity with the second mortgagee, having had notice of the second incumbrance previously to his advancing his money. See *Cockes v. Sherman*, 2 Freem. 13; and *Lewis v. Fielding*, Harc. MSS. 3 Bro. P. C. 412. Toml. edit.

Moiety only extendable against ancestor, but whole against heir.

(C) *Stileman v. Ashdown*, Amb. 13, where Lord Hardwicke held, that a judgment creditor should have satisfaction against the heir of the obligor for only a moiety of the land, the same as at law, citing *Eyre v. Taunton*, Cro. Car. 296. and *Dyer*, 207, as supporting his opinion. But although no more than one moiety can be taken in execution under a judgment against the ancestor, or alienee of the ancestor, yet under an execution against the heir, quasi heir, the entirety may be seized to answer the demand of the creditor; for against the heir the remedy depends on the rules of the common law (*Harbert's case*, 3 Co. 12 a.), and on the liability of the heir to the debts of the ancestor, and not on the statute of Westm. 2, which gave the writ of *elegit* against the debtor himself, and as a consequence against purchasers under him; vide further, post, vol. ii. 598. 601. 612. and Index, titles "Judgment" and "Megit."

assistance against a third mortgagee without notice until he is paid his mortgage as well as statute (v).

This doctrine of tacking has given rise to some nice distinctions in the nature of terms, and their applicability to this purpose. *Terms for years,*

Terms, so far as relates to the present purpose, may be distinguished into two kinds, *vis.* terms in gross, and terms attendant upon the inheritance (D). *are in gross or attendant.*

The attendancy of terms on the inheritance was originally unknown at law. There, strictly, all terms while they subsist, be the beneficial ownership in whom it may, continue terms in gross separated from the inheritance, as a distinct and separate species of property; because the law in strictness takes no notice of any ownership distinct from the legal estate. But in equity, another kind of ownership arises into notice; namely, an equitable or beneficial ownership, as distinguished from the mere legal title, the former being frequently in a different person from that in whom the latter is vested. This is the case wherever one person has an estate vested in him by the rules of the common law, whilst another is entitled to the benefit and advantage thereof. *How latter arose (E). Legal and equitable ownership distinguished.*

Now, when charging lands through the medium of raising terms was invented, and made use of to answer particular ends, as to secure jointures or portions, or money on mortgage, when the object of such terms was answered, it was found expedient to take assignments of such terms to persons to whom the inheritance was not limited, to protect it against intervening charges, and then such terms were considered in *Attendant term, part of inheritance belonging to heir.*

(v) [*Brace v. Duchess of Marlbro'*, added. For further on statutes, see 2 P. Wms. 493, cited also post, 519, that title in the Index.—*Ed.*] where a continuation of the report is

(D) See this distinction further enlarged on, post, vol. ii. 611.

(E) The text, from this place to page 460, is taken from an opinion of Mr. Fearne, to be found in Coll. Jur. 297, n. 6. Et vide Sug. V. & P. 383, 5th edit.

courts of equity, (who, in order to preserve as near a conformity as possible between the rules of legal and equitable estates, and avoid that perplexity and inconvenience which would necessarily result from the application of two different systems of property to the same subject, generally regulate the latter by analogy to the established rules and regulations, which at law govern and prevail in respect of the former) as consolidated with, and part of, the inheritance, and as belonging to the heir, being but as shadows kept on foot for particular purposes.

Equitable ownership of term and inheritance meeting in same person, without any intervening interest, term becomes attendant,

But when the practice of carving out terms for particular purposes became general, it followed as a necessary consequence that some regulation became needful with respect to the application of such terms after the purposes of their creation were answered, in cases where they were not expressly assigned to attend the inheritances. It was plain that the legal owner of such term was not intended to derive any benefit from it. The exclusion of the legal holder from all benefit was clearly in the contemplation of all parties. The specific trust of the term being declared, by consequence, any purpose beyond that was excluded (w). This afforded a ground for the interposition of courts of equity, who, from the principle of general analogy between the rules of legal and equitable property before mentioned, drew this conclusion, that where the beneficial or equitable ownership of a term, and that of the inheritance met in the same person, *undivided by any intervening beneficial interest in another person*, there an equitable union took place, and the term, which before was personal property, became annexed to the inheritance, and attendant upon it as part of the same estate and property, unless the owner expressed his intent to the contrary; for any expression or clear manifestation of a contrary intent by the owner of the property, would, it is apprehended, prevent such

unless contrary intention be expressed or implied (F).

(w) [S. L. post, vol. ii. 788.—Ed.]

Presumption rebutted by parol.

(F) So the case of *Hayter v. Rod*, 1 P. Wms. 360, proves that any limitation, though void in law, which shews an intention to sever the term from the inheritance, will be sufficient for such purpose. And therefore a term, though limited in trust for A. and his heirs, will devolve on the personal representative

union of the term and the inheritance; because one great and constant aim of courts of equity, in regard to property, is to effectuate the manifest intention of the parties interested therein, and having power to dispose thereof. Now this attendancy of a term, where no trust is declared for that purpose, is merely by construction in equity; but equity, which aims at effectuating the intention, will never make a construction contrary to the declared intent of the parties interested. But supposing no expression of the owner's intent stands in the way, but that the matter rests quite indifferent in that respect, then it is apprehended, on the principle of analogy above noticed, constructive attendancy of the term takes effect, of course, wherever the beneficial ownership of the term is not divided from that of the inheritance by any intervening beneficial interest in any other person, just as at law a term generally becomes extinguished in the legal inheritance when they meet in the same person, and no estate or interest in any other person intervenes to keep them asunder.

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Terms to attend the inheritance were invented partly to protect real estates and partly to keep them in a right channel (G), so that, by this means, the dominion of real property is kept entire, which, without the attendancy of such terms, could not be effected; for protection from mesne incumbrances implies, of course, that the ownership of the term and of the inheritance should not be severed by any intervening beneficial interest in any other person, known to the owner of the inheritance, at the time of his purchasing it; and the keeping real estates in a *right channel*, and the preserving the dominion of them entire, equally supposed the same coincidence in ownership of the term and inheritance, otherwise they could not be made to follow in one channel, nor the dominion of them be preserved entire. And wherever the beneficial ownership of

*Attendant terms
invented to keep
estates in a
right channel,
and dominion of
them entire.*

of A., if it can be collected that it was so intended; *Hunt v. Baker*, 2 Freem. 62; see also *ibid.* 131; and these implications of law against the attendancy of terms, may, it seems, like all other implications and presumptions of law and equity, be rebutted by even a parol declaration of the person in whose favor the implication or presumption is made. See Sug. V. & P. 385, 5th edit.

(G) Per Lord Hardwicke, in *Willoughby v. Willoughby*, post, 465, using the language of the older cases. See *Tiffin v. Tiffin*, 3 Ch. Ca. 55.

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the term and inheritance are not separated by any intervening beneficial interest, known to the owner at the time of his purchasing the inheritance, the attendancy of the term, upon the inheritance, becomes essential to the answering the above ends; for, without such attendance, property in the same lands, united in the same owner, would take different channels, and the dominion of real estates, instead of being entire, become split and divided between the personal and real representatives, and indeed leave to the real representatives very little but the mere name of property; for an inheritance, expectant on a term of any considerable duration, is of very little value; so necessary, therefore, is the attendancy of terms under the circumstances above-mentioned, to keep real estates in their right channel; that the very existence of real property, as distinguished from personal, seems, in a great measure, to depend upon it; for as there are few estates in which there are not some such terms, if they were not to be considered as attendant, the whole substance and value of the estate would in them devolve to the executors as personal property, whilst a real representative would be left destitute of every thing but the shadow of an inheritance. If a term, therefore, be properly circumstanced in other respects for attending on the inheritance, it seems that an express declaration of such trust is not necessary to make it attendant. For if the keeping property in its right channel, and the preserving the dominion of it be desirable ends, which seems unquestionable, seeing the attention paid them by our courts of equity, it is but reasonable to presume every owner of real property to have them in his intention and wish, unless he declares the contrary. The utility of these ends remains the same, whether a man expresses his intent to attain them or not; and therefore, for any thing that appears to the contrary, the general ground upon which equity considers terms as attendant upon the inheritance, subsists in the one case as well as the other, indeed, so far as the intention or assent of the owner is requisite to effect or complete such attendancy, it is but equitable to infer it from his silence; for it would be injurious to impute to any man a want of assent or inclination to what generally appears to be convenient and desirable, unless he expresses it himself. All the reasoning in support of the attendancy of terms pro-

ceeds on grounds independent of the owner's declaration of such a trust, and therefore is applicable in its full force to those cases where no such declaration exists.

Therefore, if a man seised in fee of lands (x), raises a term for payment of his debts, without saying, that after his debts paid, the term shall cease, or attend the inheritance, yet equity of course says, that after the debts paid, the term shall attend the inheritance.

Term to pay debts attends after debts paid.

So if a man seised in fee creates a term for ninety-nine years, and declares some trusts of the term, *vis.* in trust for himself for life, and afterwards in trust for his wife for life, and there stops, without declaring any farther trusts, it is plain, and has been resolved in equity, that after the trusts that are declared shall be expired, the term shall, from thenceforth, be attendant upon the inheritance (H).

Partial declaration of trusts of term all that remains attends.

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(x) *Anon.* 2 Vent. 359.

(H) See also *Best v. Stamford*, 1 Salk. 154. Hence it follows, that if in a mortgage transaction an outstanding term be acquired in for the security of the mortgagee, and assigned to a trustee of his nomination, with a declaration of trust in his favor only, without more, it will attend the inheritance after and until the mortgage money be paid off. In the case of a partial assignment of the term, so much as is assigned will, it seems, attend the inheritance, without any express declaration for that purpose; as if a purchaser or mortgagee obtain an assignment of a term all but a few days, it will (except to the nominal reversion) be deemed attendant on the inheritance without more; for the mortgagee or purchaser will in reality have the entire beneficial interest in the term, and consequently there will be nothing from which it may be inferred that the parties meant it to continue a term in gross. But if the term be subject to rents or charges in favor of other persons, whereby the purchaser has not substantially the whole beneficial interest in the estate, there an express declaration will be necessary to make the term attendant on the inheritance, and the mere intent of the purchaser to purchase the whole interest and make the term attendant on the inheritance will not, it seems, vary the case. If, therefore, the nominal reversion reserved be made subject to rents and charges in favor of other persons, this will prevent the attendancy of the term without an express declaration; for the whole beneficial interest will not then be in the mortgagee or purchaser: as in *Scott v. Fenhoulet*, 1 Bro. C. C. 69, where one purchased the fee-simple in his own name, and took assignments of certain terms relating to the premises in the names of trustees, excepting however a nominal reversion of eleven days to other trustees, who it was declared should stand possessed of such reversion, in trust to raise certain small rents, and the purchaser expressly stipulated for

In what cases terms will attend without express declaration.

Not if a substantial reversion be reserved, but a reversion for a few days without rent is not such.

Lease without consideration will attend, if no trust declared.

This principle, (that when the trusts declared concerning a term determined, the term should attend the inheritance) once established, led to another, namely, that if the tenant of the fee made a lease for years, without any consideration, and continued in possession, and declared no trust concerning the term, the trust would be *for him and his heirs*, a trust attending upon the reversion and inheritance; for the *res geste* evinced that no benefit was intended the trustee. Therefore if a man seised in fee (y), make a lease for ninety-nine years, without any consideration, and continue in possession, this lease will be in trust for him and his heirs, a trust attending upon the reversion and inheritance (r).

(y) Vide 2 Vent. 359. 361.

the payment of the rents to the trustees of the reversion, and entered into the usual covenants for that purpose, (to which mode of assignment the terms were confined by the original trusts on their creation,) the terms were holden to be terms in gross, and not attendant on the inheritance. See this case stated and commented on by Mr. Sugden, in Trea. on Ven. & Pur. p. 383, 5th edit. and the notes of Mr. Belt, 1 Bro. C. C. 69.

Term to be on uses after mentioned, none declared, it attends.

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(I) In like manner, if a term be raised in a will or settlement, and no use or trust declared of it, it will attend the inheritance, unless a manifest intention to devote it to another appears. In the case of *Brown v. Jones*, 1 Atk. 191, the settlement went on (after limitations to the wife for her jointure) to limit the estate to the use of trustees, their executors, &c. for the term of ninety-nine years, for such uses as were thereafter mentioned; but none were afterwards declared. The counsel for the plaintiff objected, that as there was no declaration of the trusts of the term, a resulting trust arose for the donor of the settlement beneficially, as so much of his interest in the estate undisposed of. Lord Hardwicke said it had been so determined in the case of voluntary settlements and wills; but the question was, whether a settlement to a husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life for her jointure, and after the decease of both to trustees for ninety-nine years, on such trusts as thereafter expressed; and after the determination of that estate to the first and every other sons in tail, whether such a settlement was not for a valuable consideration, and in the nature of a contract for the benefit of the wife for her jointure, and a provision for the benefit of the issue, which his Lordship thought it certainly was; observing, that the court always took agreements of this kind according to the nature of the agreement itself; and in the case before him, the limitations to the sons, after this term, would not be worth half-a-crown, if the plaintiff's objection should prevail, which would overturn and defeat the uses of the settlement; and therefore if the husband had been the plain-

And the case is not altered (s), though a term taken in be expressly limited to the owner of the fee, his executors, and administrators. Same, if assigned to tenant in fee, his executors, &c.

(z) 1 P. Wms. 375. *Goodright v. Stamford*, 2 Vern. 520. S. C. 1 Salk. 345, 2 Serjt. Wils. 329, and *Best v. 154*, post, 464.

tiff in the cause, the court would have considered it merely as a trust term to attend the inheritance, according to the limitations in the settlement.

In another and more modern case, where the testator devised lands to trustees for ninety-nine years, upon trusts to be afterwards declared in the will, and after the expiration of the said term, he gave the same lands to several tenants for life without impeachment of waste, with remainders over in strict settlement, but declared no trusts of the term, the court held, that there was no resulting trusts for the personal representatives of the testator, but that the term should attend the inheritance. The Lord Chancellor observing, that if a precedent had been before the attorney in drawing the will, he would have used the words, "and from and after the expiration, or other sooner determination of the said term, and in the mean time subject thereto, and to the trusts thereof," then, &c. That the probability was, the trusts were for jointures for tenants for life in possession, longer terms being usually raised for younger children's portions. The question on the whole will was, whether the intention was not sufficiently declared without the above technical words, from the power given of making leases, as well as from what he had said as to the plate? And his Lordship said he had some manuscript cases of Lord Hardwicke's which he would inspect, as he was surprised at the doctrine attributed to Lord Hardwicke in *Brown v. Jones*; 1 Atk. 191. et ubi supra. Same law, if term be created by will, and no contradictory intention appears.

At the sitting of the court on a future day, Lord Eldon said he had not been able to find any thing amongst his own manuscript cases, but he had been favored by Mr. Eden with a manuscript note of Lord Northington's for what Lord Hardwicke said in *Brown v. Jones*, which principally differed from the report in Atkyns, in not mentioning wills as well as voluntary settlements. Lord Eldon further observed, that he had looked into all the cases, and was under the painful necessity of giving an opinion contrary to the dictum of Lord Hardwicke as reported by Atkyns. But at the end of the manuscript note which had been read, Lord Hardwicke appeared to have said, "he would not defeat the settlement, nor decide contrary to the words of it." By these words it appeared that Lord Hardwicke thought the intention of the parties should be considered. If the case were clear, that the testator meant that the parties under the will in question should not take till the end of ninety-nine years, it must be so. But if upon the whole of the will the testator intended that the tenants for life should take beneficially, the term of years was then subject to their estates. Lord Eldon thought there was enough in the will before him to shew, that the tenant for life and those in remainder should enjoy the estates limited to them and therefore that the proposition, that the term was in the personal representative, could not be supported. The decree was, that the term formed no part of the personal estate, but attended the inheritance according to the limitations contained in the will. *Sidney v. Miller*, Coop. Rep. 206. Dictum in preceding case not agreed to.

Term assigned to trustee will attend, though not so declared.

And if a man purchases land (a), and takes the fee in his own name, and an assignment of a mortgage term in a trustee's name, the term shall attend the inheritance, although not so declared in the assignment of it; for the purchaser becomes both the hand to receive and the hand to pay off the mortgage money; the debt therefore is extinguished, and the mortgage term, *qua* such, gone; then, though the term itself is not extinguished in point of law, being in a trustee, yet it becomes attendant upon the inheritance, and must follow it in equity, as if it were made to do so by the act of the party (K).

(a) *Tiffin v. Tiffin*, 1 Vern. 1. *Goodright v. Sayles*, 2 Serjt. Wils. 329.

Fee assigned to trustee, term attends without declaration.

(K) So if a person take an assignment of the term in his own name, and a conveyance of the fee in the name of a trustee, the term will attend the inheritance without any express declaration. *Langton, ats. ———*, 2 Ch. Ca. 156. *Dowse v. Percival*, 1 Vern. 104. *Attorney-General v. Sands*, 3 Ch. Rep. 19. 33. 2d edit; and if the term be assigned to a trustee in trust for the purchaser, his executors, administrators, and assigns, without the word "heirs," it will nevertheless be an attendant term. *Best v. Stamford*, Pre. Ch. 252. *Tiffin v. Tiffin*, ubi supra. *Holt v. Holt*, 1 P. Wms. 394, cited.

Lessee purchasing inheritance, term attends before conveyance executed.

And the same rule prevails where a man possessed of a term for years contracts for the purchase of the inheritance; for the vendor stands seised in trust for the purchaser from the time of the contract. This was decided in *Capel v. Girdler*, 9 Ves. 509, where a testator having a lease in his own name contracted for the purchase of the inheritance subsequently to the making of his will, and died before the conveyance to him was completed. Having contracted for the purchase of the inheritance, he became complete owner of the whole estate; for it was clear, the Master of the Rolls said that in a court of equity, a party who had contracted for the purchase of an estate, was equitable owner. The vendor was a trustee for him. If he had by his will afterwards disposed of all his lands, this estate would have passed by that will; and his Honor thought it had been long established, that where the same person has the inheritance and the term in himself, though he may have in one the equitable interest, and the legal estate in the other, the inheritance draws to itself the term and makes that attendant upon it. That appeared from *Whitchurch v. Whitchurch*, 2 P. Wms. 236. *Goodright v. Sayles*, 2 Serjt. Wils. 239, and many other cases, [see Mr. Butler's note to Co. Litt. 290 b. n. 1. s. 13,] and he did not apprehend that it was then open to dispute.

General rule as to attendant terms.

Sir William Grant's decision was, that the residuary legatees, under the will of the said testator, had no claim to the term against the heir, because the term was attendant on the inheritance in favor of the heir. In the course of his judgment, his Honor referred to *Cook v. Cock*, 1 Roll. Abr. 616, pl. 3. *Watts v. Fullarton*, 2 Doug. 717. cited, 4th edit., and *Best v. Stamford*, (ubi infra, in text,) which latter case he observed, determined the rule as to the attendancy of terms to be, that where a term, if in the same person who has

A *feoffe* sole seised in fee (b), upon her marriage with A., made a lease to trustees for one hundred years, in trust for her husband for life, remainder to herself for life, remainder to the issue of that marriage, remainder to the wife, *her executors and administrators*. The husband died without issue, she married a second husband and died, and the question was, whether this term should be attendant upon the inheritance, or should go to the husband as a term in gross? *Et per curiam*. It is a term attendant; because the trust for which it was created is at an end (L), the first husband being dead without issue.

Administrator not entitled to term limited to intestate, her executors, &c. its purpose having ceased.

(b) *Best v. Stamford*, Salk. 154. 2 Vern. 520. [S. C. Pre. Ch. 252. 2 Freem. 288.—Ed.]

the inheritance would merge, there it must attend. Mr. Vesey adds, "see also 2 Ves. jun. 420. 602. 6 ibid. 222. and 8 ibid. 127."

A further rule in equity is, that a term attending the inheritance, will attend all the estates, charges, and incumbrances, subsisting on such inheritance. If, therefore, after a term has been assigned to attend the inheritance, a mortgage or conveyance be made of the estate for a valuable consideration, the trust of the term will immediately follow the limitations of the inheritance, and the trustee will be a trustee for the new use without any further assignment, as against the grantor, and all persons claiming as volunteers, with notice. *Charlton v. Low*, 3 P. Wms. 328. It is however the practice of conveyancers, to insist upon the actual assignment of all outstanding terms to a trustee for the purchaser or mortgagee. And this practice should be uniformly followed, for the reasons noticed, ante, 450, 451 d, notes (S) and (T).

Term attends new uses without declaration.

(L) In like manner, in *Davidson v. Foley*, 2 Bro. C. C. 203, where A. by will gave lands to trustees for certain terms, with remainder to Lord Foley and E. Foley for life, and the trusts of the terms were for payment of scheduled debts, and to make an allowance to Lord Foley and E. Foley. The debts being paid, it was held, that a trust resulted to the tenants for life; Lord Thurlow observing, that the rule of law was, that where the trusts of a term are exhausted, a trust results, for the want of a further disposition, to the legal tenants. So, Lord Eldon, in *Maunderell v. Maunderell*, 10 Ves. 270, said, he collected from all the authorities, that when the purposes of the trust are once satisfied in equity, the ownership of the term belongs to the owner of the inheritance, whether declared by the original conveyance to attend the inheritance or not: it was not unusual to insert that express declaration in the original conveyance, yet it was not uncommon to omit it; but whether it were inserted or not, the doctrine of equity was the same, that the term would attend the inheritance.

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Trust of term exhausted, it attends.

So term to raise portions, attends after portions paid.

So it is, where a term is raised to pay portions (c), and the portions are paid; or a termor purchases the inheritance in trust, the term shall be attendant (M).

One having term, purchases inheritance in name of trustee, term attends, though no declaration, (except as to creditors).

And, except as to creditors, the same principle applies when the fee is placed in trust (d), and the term taken by the owner of the fee; for it is the union of the beneficial ownership of the term and of the inheritance, undivided by any beneficial interest in any other person known to the owner of the inheritance at the time of his purchasing, which constitutes that connection or relation between them, which is the ground of the term being considered as attendant upon the inheritance; and in this respect the connection in the ownership is substantially the same, whether the inheritance be in the owner and the legal estate in the trustee, or the case reversed, and consequently the same call for the attendancy of the term to keep real property entire in one channel, subsists in both cases (N).

(c) *Best v. Stamford*, Salk. 154. 1 Vern. 520. *Goodright v. Sayle*, 2 Serjt. Wils. 3.

(d) *Dowse v. Derivall*, 1 Vern. 134.

(M) Unless there be a special proviso determining the term of the performance of the trusts for which the term was raised.

(N) The same law was stated and recognized in *Capel v. Girdler*, 9 Ves. 509, cited in note (K), ante, p. 463.

Term in remainder will attend.

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On the subject of implied attendances of terms, it is further observable, that if the owner of the inheritance have also a satisfied term vested in him, but which is prevented from merging by reason of another term intervening, the former term will attend the inheritance without any express declaration for that purpose, although the intervening term may be on trusts which are still subsisting. *Whitchurch v. Whitchurch*, 2 P. Wms. 236. 9 Mod. 124. Gilb. Eq. Ca. 168.

Custom of London.

In the case of *Dowse v. Derivall*, quoted in the text, it was determined, that if a freeman of London, possessed of a term, purchase the inheritance in the name of a trustee, the term will not be subject to the custom of London, though no trust be declared of the term to attend the inheritance. The custom affects the personal estate only of the freeman, (2 P. Wms. 274) and not his real property. *Rich v. Rich*, 2 Ch. Ca. 160. *Tiffin v. Tiffin*, 2 Freem. 66. Nevertheless a mortgage in fee has been held to be within the custom. *Thornborough v. Baker*, 1 Ch. Ca. 285.

All terms so circumstanced as they would merge if vested in the owner of the inheritance (e) together with the inheritance, being considered both at law and in equity as terms attendant upon the inheritance, whether they be declared so or not; a question arises, whether there be any distinction between terms limited expressly to attend the inheritance, and terms attending the inheritance as a resulting trust by implication of law, as to the capacity of being made use of to defend a third against a second mortgagee, where the former is free from the imputation of notice.

If any difference between express or implied attendant terms.

Previous to the case of *Willoughby v. Willoughby* (f), a notion generally prevailed, that although a satisfied term resulting by operation of law, might, if got in, be made use of to protect a purchaser, a term *once assigned to attend the inheritance*, could not be so applied; for it could not enure to any other purpose than that prescribed, unless *severed again by the owner of that inheritance*; but in that case Lord Hardwicke explained this distinction, observing that its applicability to such purpose was an unavoidable consequence of the rule, that "*a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*"

Once supposed that term assigned to attend, could not protect purchaser. Contra nunc.

The facts of the case were as follow:

George Willoughby, being seised in fee of an estate in W. (subject to a mortgage term for five hundred years) by articles dated 12th November, 1717, made upon his marriage, agreed to settle this estate to the use of himself for life, and afterwards to the intent that his wife should, out of the rents, &c. of part, take an annuity of 250*l.* by way of jointure, with remainder, as to the whole estate, to the use of the first and other sons of the marriage in tail male, with remainder to George Willoughby in fee, with a power for the said George to charge the estate by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the estate was subject to a mortgage for a term of years, as

Attendant term may be disannexed, and assigned to protect a mortgagee, and then again made attendant.

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(e) *Goodright v. Sayles*, 2 Serjt. Wils. 329, et vide post, vol. ii. 615. S. C. better stated 1 T. R. 763. This case is said by Butler, *arg^o*. in 2 Jac.

(f) *Willoughby v. Willoughby*, in Chan. June 19th, 1756. [Vide etiam & Walk. 52, to be the *Magna Charta* of this branch of the law.—Ed.]

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mentioned above, which, being satisfied, the said term was by indenture, dated 17th August, 1718, assigned to Shelling and Popham and their executors, *upon trust* for G. W., his heirs and assigns, *to attend the inheritance*. A settlement was made of the estate 14th March, 1718, pursuant to the articles: 14th March, 1750, George Willoughby made his will, and thereby executed the power reserved to him, by charging the estate with 3000*l.* for the portions of his younger children, and afterwards died, leaving Jane his widow, Henry his eldest son, three daughters, and a younger son George. Henry, having attained his age of twenty-one years, and being tenant in tail, suffered a recovery, and limited the estate to trustees in fee, to the use of such person and persons, and for such estate as he should by deed appoint. Henry, in pursuance of his power, by indenture dated in June, 1751, for securing 870*l.* which he had borrowed of Jane his mother, declared the trustees should stand seised, and the estate be charged with the payment of this sum and interest. The term of five hundred years still standing out in Shelling and Popham. Afterwards Henry borrowed 800*l.* of the defendant Cripps, and for securing this with interest, by indentures of lease and release, dated 14th and 15th June, 1752, he conveyed the estate in mortgage to Cripps and his heirs; the same day, Shelling, the surviving trustee, assigns the term of five hundred years to Boot, upon trust, in the first place, to protect the estate limited to Cripps and his heirs from mesne incumbrances, and *subject thereto*, to *attend the inheritance*. It appeared upon the evidence, that Cripps had full notice of the articles and settlement, and that, notwithstanding, in the release, he took a covenant from Henry that the estate was free from all incumbrances except the five hundred years term, and the several mesne assignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by Jane the mother, and the younger children, for payment (by sale of the estate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother, and that then the rest of the incumbrances might be paid according to their order and priority. The defendant Cripps insisted that, as the legal estate was in Boot, his trustee, and as he was a purchaser for a valuable consideration and without notice of the first mort-

gage, he was entitled to be preferred in payment of his mortgage, upon this principle, that he had both *law* and *equity* on his side, and the mother *only* equity.

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Lord Hardwicke divided the case into two questions, the first of which is alone necessary to be noticed at present (o), namely.

Whether, this term being assigned to Shelling and Popham upon an *express* trust, Cripps could, *in equity*, have the benefit of it to protect this mortgage, if he had had no notice of any of them?

This question, his Lordship said, depended upon three considerations, namely;

First, What is the nature of a term to attend the inheritance?

Secondly, What kind of grantee is entitled to the protection of such a term; or, in other words, in whose hands such a term shall be allowed to protect the inheritance?

Thirdly, Against what estate, charges, and incumbrances, the protection arising such a term shall extend?

His Lordship upon the first said, that terms to attend the inheritance are the *creatures* of a court of equity, and were invented partly to protect real estates, and partly to keep them in a right channel: here arises a distinction between terms in gross, and terms to attend the inheritance, though at common law they are the same; for, *in equity*, such a term shall be applied according to the uses, estates, and charges which the owner of the inheritance has carved out of it. *In equity* the consideration always is, who has the *real* right *in conscience*; and where the termor for years is but a trustee for the owner of the inheritance, he shall not keep out the *cestui que trust*; and therefore the term is liable to all his charges. These terms were not known till Queen Elizabeth's time, as appears by

Nature of attendant terms.

(O) Other points of this case are reported in 1 T. R. 763, and noticed ante, 450 a, n. (S).

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Pemberton's argument in the Duke of Norfolk's case; before that time the law looked upon them with a jealous eye, as they tended to defeat the crown of its forfeitures, and the lord of the fruit of his tenures. And wherever a term is *vested in a stranger* in trust for the *owner* of the inheritance, this court has *always* said, that it shall be liable to and affected by *all* the incumbrances *created by the owner*. Equity will unite the term and inheritance to keep the property entire; as where he who has the inheritance in tail suffers a recovery, the term *will follow the uses declared upon that recovery*. This doctrine has always had its full effect in cases between the heir of the owner of the inheritance, and the executor, though a distinction as to creditors has been made (*h*), which is not material in the present case. The following cases have been cited, viz. *Tiffin v. Tiffin*, 1 Ch. Ch. 49. 1 Vern. 1. *Best v. Stamford*, 2 Vern. 520. Pre. Ch. 252. *Hayter v. Rod*, 1 P. Wms. 360. *Whitchurch v. Whitchurch*, 2 P. Wms. 236. *Lord Dudley v. Ward*, Pre. Ch. 241, 242. 2 Ch. Ca. 160, on Custom of London. These cases only prove this general proposition; namely, That, as between the heir in fee and in tail, and the executor, this *doctrine* does take place. The court sometimes disannexes the trusts of a term to attend the inheritance from the strict legal fee, but still it does it *in support* of the *right*.

Persons entitled
to protection of
terms.

Upon the second consideration, What *kind of grantee* is entitled to the protection of such a term; or, in other words, in *whose hands* such a *term* shall be allowed to protect the inheritance?

Mortgagee,
without notice,
taking defective
conveyance and
assignment of
term, protected
(P).

Such a grantee must be a purchaser for a valuable consideration, a purchaser *bonâ fide*, not affected with any fraud or collusion, and without notice of any prior charge; for notice

(*h*) 1 Vern. 104.

(P) The rule of equity as to this is, that a second mortgagee without notice, acquiring in a satisfied term, may protect himself, the conscience being equal. *Evans v. Bicknell*, 6 Ves. 184, where the Lord Chancellor was of opinion, that at law, an assignment of such term is not to be presumed without some dealing upon it.

makes him come in fraudulently; and in this description of a purchaser I include a mortgagee. If such a purchaser has no notice of a prior incumbrance, and takes a defective conveyance of an estate, and an assignment of a term to attend the inheritance; in this case he shall have the benefit of the term to protect this estate, and he may either defend his possession by it, or he may use it to recover his possession at law, though his adversary has the inheritance, which makes me say this court often *disannexes* the term to attend, &c. from the inheritance. This is the meaning when it is said, "that if a man has both law and equity on his side, he shall not be hurt here."

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In *Wilkes v. Bodington*, Lord Cowper (i) has laid it down as a rule in equity, that where a man is a purchaser *without* notice, he shall not be annoyed in equity, *not only* where he has a prior legal estate, *but where he has a better* title or right to call for the legal estate than the other (q). So, in this case, the defendant Cripps must have the better right to call for the assignment of this term.

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Thirdly, Against what estate, charges, and incumbrances, the protection arising from such a term shall extend? The answer to this question may be general. It shall extend to *all* estates, charges, and incumbrances, created *intermediately* between the raising of the term, and the making the parties incumbrance (R); but it must have all these previous *qualifications*: it must be made *bonâ fide*: it must have *freedom* from notice: it must have the *first* and *last* right to call for an assignment of

*Against what
estates and
charges protec-
tion of term
extends.*

(i) 2 Vern. 599, 600. et supra, 449.

(Q) And whether the party be a purchaser of the legal estate, or only of an equitable interest will not make any difference, per Reynolds, Lord Chief Baron, Lilly's Prac. Conv. 393, 394, et vide Fitzg. 213.

*Equitable in-
terest protected.*

(R) Except crown debts by specialty. *Nicholls v. House*, 2 Vern. 390. *King v. Smith*, Wightw. Rep. 34. Crown debts by simple contract do not bind the lands, if the purchase or mortgage be for a valuable consideration and without fraud or covin. See cases cited, and also *Wilde v. Fort*, 4 Taunt. 344. *Rex v. St. John*, 2 Price, 317. *Rex v. Lambe*, 1 M'Lel. 408, et infra, 482. vol. ii. 1078.

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the term. It was admitted by the counsel, that it would be so, where the old term was *standing out* in the original grantee or mortgagee, and had never been assigned to attend the inheritance; but it was said first, that when it has been assigned upon an *express trust* to attend the inheritance, it *shall* attend all the estates *carved out* of that inheritance. Secondly, When a term is so assigned, it becomes and is so annexed to the inheritance, that it cannot be severed from it.

No distinction
as to capacity
to protect, be-
tween express
and implied at-
tendant terms.
(See post, vol. ii.
615.)

This is an attempt to establish a *distinction* between a term assigned upon an *express* declaration of trust to attend the inheritance, and a term declared to be so by the *construction* of this court. *Oxwick v. Brockett*, Eq. Ca. Abr. 355, has been cited. This case is not in the Register's book, and the minutes are so imperfect, nothing can be collected from it. It was argued, that where a term was *assigned* to attend the inheritance, that is *notice* to the mortgagee of certain incumbrances; but this is a mistake; for an assignment of a term to attend the inheritance *generally*, is *only* notice that there is an inheritance to attend, but *not* that the estate is bound by any other *incumbrance*. Such an assignment gives a purchaser *no* notice but what he has from the deed. But if, in such assignment, it be declared that the term is assigned to protect the *uses* of *such* a settlement, or the *uses* in *such* a deed, it will be *notice* of the *deed* or *settlement*, and of *all* the uses in them, and the *purchaser* is *bound* to find them out *at his peril*; and I have known cases wherein it has been assigned in this manner. Again, it has been said, that such a term is so annexed to the inheritance, that it will go along with *all* the estates which are carved out of it; so here, in the case of the *first* mortgage, where a new conveyance is made of the inheritance for a valuable consideration, the *term* will *follow* it, and the termor will *become* a trustee for the purchaser. I agree this will be so against the *grantor* and his *heirs*, and *all* claiming *under* him or them, either as volunteers, or *with notice*; and if he convey a *new estate* of the inheritance, the trust is affected by it; but when a *new purchaser* for a *valuable* consideration, with *all* the qualifications aforesaid, gets an *assignment* of *such* a term, he comes in a *different degree*, and how can equity take it from him without contradict-

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ing *all their rules*? It is objected, that this will leave the inheritance to go one way, and the trust of a term another. It is not necessary to enter into all the cases where a term to attend the inheritance may be disannexed and turned into a term in gross. It may be done even where it is upon a contingency. (Serjeant Maynard, in the Duke of Norfolk's case.) *It may be done at any time by the owner of the inheritance.*

Willoughby

v.
Willoughby.Attendant
terms may at
any time be
made a term in
gross by owner
of inheritance.

It may be objected, that if such term is not so annexed to the inheritance as to go along with it, it will put it into the power of the trustee to assign it to whom he pleases. I take this case to be the same as that of trustees to preserve contingent remainders. If such trustees join in a conveyance to a purchaser for a valuable consideration, who has notice of the trust, such purchaser is affected with the trust; but if he has no notice, the purchaser shall retain the estate, but the trustees shall make satisfaction. *Mansell v. Mansell*, 2 P. Wms. 612. So, here, if the second mortgagee has had notice of the first mortgagee, he shall make no use of the term to his prejudice; and if he had no notice, the trustee who assigns it ought to make satisfaction. But, this doctrine would make the assignment of such term to a purchaser's own trustee such, that it would protect him against nothing at all; for if, wherever there is a charge made upon the inheritance for a valuable consideration, that draws after it so much of the trust of the term against the grantor, and then the puisne mortgagee was to take it affected with that derivative trust, such puisne mortgagee would never be safe.

It was said, at the bar, to be a rule among the conveyancers, wherever they found an old term limited to attend the inheritance, not to disturb or meddle with it. I have inquired of a very able and experienced conveyancer (Mr. Filmer) and find there is no such general rule. It is true, Mr. Ward, of the Temple, declared it as his opinion; but, if he practised so, that will not make it a general rule. Where such a term has been assigned upon an express trust to attend the inheritance as settled by such a deed, and the conveyancer is satisfied the uses of that deed have not been barred, he may very safely

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Willoughby v. Willoughby.

Purchaser for valuable consideration, without notice, not to be hurt in equity.

rely upon it (s), especially in the cases of purchasers and mortgages, where the deeds are always taken in; for, if he has the deeds and the assignment of the term in his hands, they *cannot* be made use of *against* him (r): but this will not make it a general rule, several inconveniences have been objected; but all these are over balanced by the inconvenience that would happen by breaking into the rule, "*that a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*" Collateral warranties, non-claim, descents cast, which are the wise policies of the law to quiet men's possessions, are grounded upon the same principle. Upon the whole, I am of opinion, that if Cripps had had no notice of the jointure, portions, or other incumbrances, he would *in equity* have *been entitled* to the *benefit* of this term (u).

Second mortgagee, without notice, obtaining legal estate by means of attendant term, and having the deed preferred in ejectment.

The opinion thrown out by Lord Hardwicke on this occasion, was corroborated by the opinion of the court of King's Bench, in the following case:

Jones, seised in fee of several estates, demised the same, in 1761, to Aubrey, for nine hundred and ninety-nine years, by way of mortgage (k). Afterwards, in 1768, this term was as-

(k) *Goodtitle v. Morgan*, 1 T. R. 755. [over-ruled, 9 Price, 267.—Ed.]

Doctrine in text questioned.

(S) Because the very assignment carries notice of the old uses, 1 T. R. 763. Sed qn. this, says Mr. Sugden, in his *Vend. & Pur.* p. 367, n. (I), 5th edit. for if the person claiming under the settlement, should sell the estate to two distinct purchasers, who were equally innocent, it seems that the second purchaser, by procuring an assignment of the term, might exclude the first purchaser during the term.

Actual assignment of term preferred to declaration of trust.

(T) There may be duplicates, which circumstance render it necessary to take an actual assignment of the term; and, indeed, a mere declaration should never be relied on, unless all the title deeds are delivered to the purchaser or mortgagee; and even then, the *bonâ fide* incumbrancer who has obtained an actual assignment of the term without notice, will be preferred to the person who has the deeds and a declaration of the trust of the term only.

(U) See more on the subject of attendant terms, and as to the assignment of them, Butl. Co. Litt. 290, b. n. (1). s. 13. Sudg. V. & P. 355, 5th edit. Cham. op Lea. 418, and *infra*, 477, note (A).

signed to Lockwood in trust for Jones, as to part of the lands, and in the mean time to attend the inheritance; in 1767, Jones mortgaged to Morgan, and in July, 1769, to David. Both these mortgages were in fee. In December, 1769, Jones and Lockwood assigned the last-mentioned lands to Morland, his executors, &c. for the remainder of the term of nine hundred and ninety-nine years, in trust for Sprigg, for securing 10,000*l.* lent by Sprigg to Jones. Afterwards, Jones, by indentures of lease and release, mortgaged the same estates in fee to Sprigg, for securing the 10,000*l.*

Goodtitle
v.
Morgan.

On the mortgage to Sprigg, all proper searches were made on his part for incumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demise of the term for nine hundred and ninety-nine years, and the assignments of it, which were kept in the hands of Lockwood, on account only of containing other premises in mortgage to Lockwood, and which were not included in the mortgage to Sprigg, nor assigned to Morland, his trustee, but counterparts of them were then delivered to Sprigg. On these facts, the question on an ejectment was, whether Morgan and David, or Sprigg should be preferred.

On the part of Morgan and David it was contended, that this term must be considered as attendant on the inheritance, and consequently at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance, but by their consent. That if, previous to the conveyance to Sprigg, in 1769, Morgan and David had brought ejectments upon their mortgages, neither Jones nor Lockwood, his trustee, could have set up this term as a bar to their ejectments; then if Jones himself could not set up the term, it was absurd to say, that those who claimed under him might, for they could not claim a greater estate than he had. Then Jones, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land.

Consequence of leaving deeds with mortgagor (v).

See per Ashhurst, Justice, no man ought to be so absurd as to make a purchase without looking at the title deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did

Incumbrancer not postponed by permitting mortgagor to retain deeds.

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(V) The priority acquired, or rather the postponement incurred, by permitting the mortgagor to retain possession of the title-deeds, has already been considered, see ante, p. 54 to 57 inclusive. The preceding remarks may be taken for good law, and in corroboration we may here add, that in an *Anonymous* case cited by Mr. Bell, in *Harper v. Faulder*, ubi infra, the Lord Chancellor said, there was no case in which it had ever been held, that the mere circumstance of a first mortgagee not taking the title-deeds, would entitle the second mortgagee who had got the deeds to file a bill in equity to obtain a preference, and the position of Mr. Justice Buller, in *Goodtitle v. Morgan*, was denied to be law. So, in another case, *Barnet v. Weston*, 12 Ves. 133, where it was objected in favor of a second mortgagee, that the first mortgagee had not taken possession of the title-deeds; the late Master of the Rolls, Sir William Grant, said, that the old cases for postponing a first mortgagee under those circumstances, unless a case of fraud could be made out, had been considerably shaken; upon which the point was given up. In a late case, when the counsel in the cause submitted that the judgment in *Goodtitle v. Morgan* had not been over-ruled, the Lord Chief Baron interrupted him by saying, that it most certainly had been over-ruled in very numerous instances. No one would think of mentioning that case as an authority before the Lord Chancellor. Even in consultation, formerly, the Lord Chief Baron knew the Lord Chancellor would not hear it. *Bailey v. Fermor*, 9 Price, 276.

Unless deeds are legally incident to his security.

The next and last case (*Harper v. Faulder*, 4 Madd. Rep. 129, 1819), carried this doctrine a step farther, and settled, that the first incumbrancer leaving the deeds with the mortgagor, should not be postponed, unless the possession of the title-deeds were legally incident to his security. It is requisite that this case should be stated more at large:—Trustees being seised of certain estates in trust to raise a large sum of money, granted an annuity to F., the defendant, for 5000*l.* (being a seventh part only of the sum they were directed to raise), which annuity was secured by a term of years and a judgment not docketed, but the annuitant permitted the deeds to remain in the hands of the trustees, who afterwards made a mortgage for raising other parts of the said sum of money, without informing the mortgagee (the plaintiff) of the first incumbrance. The question was, which party was entitled to priority, or more correctly, whether the defendant (the annuitant) was to be postponed to the mortgagee? For the plaintiff it was argued, that F. by suffering the title deeds to be out of his possession, enabled Porter and his trustees to commit a fraud upon the plaintiffs, whose security was therefore to be preferred. The cases on the subject, it was contended, were rather negative than affirmative. The *Wretched House Tavern Case* (*Peter v. Russell*, 1 Eq. Ca. Ab. 321, pl. 7, ante, 41), shewed that a mortgagee suffering deeds to be out of his hands, must exculpate himself, and produce a good reason for per-

not know of it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the

mitting it. In *Penner v. Jemmett*, mentioned in the note to *Tourle v. Rand*, 2 Bro. C. C. 652, and in a note to 1 Fonbl. 165, 2d edit. it appeared, that Jemmett obtained from the corporation of Kingston on some pretence, two grants of the same purport, and by that means was enabled to practice a fraud by raising money on each grant. *Evans v. Bicknell*, 6 Ves. 183, was an authority for the position, that mere negligence in parting with title-deeds did not amount to fraud, but in this case there was gross negligence. If a mortgagee did not take the title-deeds, that was gross negligence in him. When a rent charge was granted, it was usual to have the title-deeds deposited in the hands of some third person. There was no difference between a mortgage and a rent charge, in regard to the possession of title-deeds; in both cases they ought to be taken in. Substantially this was a mortgage, and not taking the title-deeds, amounted to *crassa negligentia* in F. If he had taken the title-deeds, or had an indorsement on the trust deed of the security granted to him, no fraud could have been committed. A judgment as an additional security was acknowledged, but this judgment was not docketed. If it had, it would have led the plaintiffs to inquiry. It shewed the secrecy with which the transaction was accompanied. On the other side it was contended, that the money raised by the annuity and rent charge to F. was raised in part execution of a trust, by which the trustees were to raise a much larger sum, and it was absolutely necessary that the title-deeds should remain in their hands, to enable them to raise the remainder of the money in pursuance of their trust, and F. could not insist on having the title-deeds; there were also charges on the estate prior to F.'s charge, and the trustees were bound to retain the deeds as a security for those charges. The trustees, therefore, could not deliver up the deeds without a breach of trust; but if they could, and F. was entitled to call for the deeds, his negligence in that respect, would not give a preference to a subsequent incumbrancer, no intentional fraud being practised or attributed to him. To this it was replied, that supposing F. was not entitled to the possession of the title-deeds, he had still a right to insist that they should be impounded in the hands of a third person for his security, and by not insisting on that, he enabled the parties to commit a fraud on the plaintiff. The Vice Chancellor said, he was not called on to decide the general questions which had been argued. If a prior incumbrancer was to be postponed, simply for leaving the title-deeds in the hands of the mortgagor, which was a proposition very difficult to be maintained at that day, either upon authority or principle, such a doctrine could only be applied in cases, where the possession of the title-deeds were legally incident to the estate of the first incumbrancer, and where it might be said, that he had failed to use reasonable diligence for his own protection. In this case, the trustees with whom F. dealt, held the estate first upon trust to raise a sum of 35,000*l.*, and next upon trust to indemnify the lenders of the 35,000*l.* against a rent charge of 400*l.* a year to the widow of Porter, and against a portion of 5000*l.* payable to the younger children of Porter. F.'s

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fraud; and Sprigg, who has got the legal estate, must be preferred.

Annuitant not entitled to custody of title-deeds.

annuity was purchased for 5000*l.* being part of the 35,000*l.* to be raised by the trustees, and was secured in the usual manner by a term of years. Not only the possession of the title-deeds was not legally incident to his estate, nor was he required, upon the principle of reasonable diligence, to have stipulated for the possession of them; but it would have been a breach of trust on the part of the trustees, to have given to one incumbrancer those instruments which they were bound to keep for the common security of all the persons advancing money upon the credit of their trust. If, therefore, the Vice Chancellor could adopt in any case the arguments which had been used on the part of the plaintiffs, they would form no ground in this case for postponing F.'s annuity. The bill was consequently dismissed with costs.

Mortgagee of leasehold omitting by accident to take lease not postponed.

In a still later case, an attorney who had prepared a mortgage of leasehold property by the instruction of the mortgagor, delivered the mortgage with the original lease to the mortgagor, who afterwards delivered the mortgage to the plaintiff (the mortgagee), but retained the lease. The plaintiff was not aware, at the time, that the possession of the lease was of any consequence; but when he afterwards found that it was, he applied to the attorney who prepared the assignment for the lease, and he stated that he had delivered it to the mortgagor. The lease had been twice renewed, and at the trial at the Assizes, on a question whether the plaintiff was entitled to priority over a subsequent mortgagee, the Lord Chief Baron left it to the jury to say whether the original lease had been left in the hands of the mortgagor to enable him to commit a fraud: in that case they would find a verdict for the defendant; otherwise, they should find for the plaintiff. The jury returned a verdict for the plaintiff, which the court above refused to disturb,—Graham, B. observing, that he thought of the two the question had been left too favorably for the defendant, for that the fraud practised by the mortgagor was purely matter of accident. The plaintiff could not be presumed to have intentionally put his security in peril. *Bailey v. Fermor*, 9 Price, 266.

No postponement by leaving deeds with mortgagor after due diligence to obtain them.

From these cases, and the observations adduced in the page before alluded to, it appears, that in order to postpone the first mortgagee, on the ground of his leaving the title deeds in the possession of the mortgagor, and thereby enabling him to practice a fraud, there must be a voluntary and unjustifiable concurrence on the part of the first mortgagee amounting to fraud. *Peter v. Russell*, 1 Eq. Ca. Abr. 321. *Penner v. Jemmett*, Fonb. Tr. Eq. b. 1. c. 5. s. 4. *Tourle v. Rand*, 2 Bro. C. C. 650. *Plumb v. Fluit*, 2 Anstr. 432. *Evans v. Bicknell*, 6 Ves. 174. If, therefore, the mortgagee has used all due diligence to obtain possession of the title-deeds, it should seem he will not be postponed unless gross negligence can be proved. 2 Bla. Com. 160, n. (4), 15th edit. A court of equity, however, will not take from the second mortgagee the title-deeds which he may have honestly obtained, unless the first mortgagee will undertake to pay him his money. *Head v. Egerton*, 3 P. Wms. 278. *Belchier v. Butler*, cited ante, 455, n. (B). *Kensington Ex parte*, 2 Ves. & Bea. 83, et vide ante, 52 to 57, inclusively, where this subject is treated of more at large.

But it behoves such trustees to be very cautious how they act, if called upon to sever the term from the inheritance, lest they inadvertently be guilty of a breach of trust; for wherever a trust to attend the inheritance devolves upon a man, every time the *cestui que trust* makes any disposition of the lands, either by way of conveyance or incumbrance, the trustee of the term becomes from thenceforward a trustee for the grantee or incumbrancer to the extent or amount of his grant or incumbrance; and therefore any assignment by him of the legal estate on other trust than to attend the inheritance, made to any one who has not the prior or leading security or conveyance of the equitable estate during the term, will, if such trustee can be affected with notice, either actual or presumptive, be a breach of trust, for which the trustee will be answerable in a court of equity (x).

Trustee of attendant term becomes trustee for legal incumbrancer without assignment (w).

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Hence, assigning to second mortgagee, with notice of first, is breach of trust.

Therefore, before such trustee severs a term so assigned, in order to use it as a term in gross, to secure mortgages or the like, he ought to be satisfied, by the production of the title-deeds or other satisfactory evidence, that his *cestui que trust* has done no act to affect the inheritance; for it is to be observed, that when a trustee severs a term designated to attend the inheritance, without being satisfied in this respect, he voluntarily takes upon himself to do an act which may vary the rights of those *whose rights* it is *his duty* to protect. Should a trustee voluntarily make a severance in such case, *after actual or presumptive knowledge*, that his *cestui que trust* was involved in incumbrances, there can be little doubt but that he

Trustee on assigning term, ought to be satisfied that there is not any prior incumbrance.

(W) Et vide S. L. ante, 189 and 463, latter end of n. (K) in the last reference; as also the late case of *Frere v. Moore*, 8 Price, 475, ante, 451, n. But it is presumed, the doctrine advanced by Mr. Butler, in his argument in the case *Cholmondeley v. Clinton*, 2 Jac. & Walk. 54, is good law: namely, that in the case of a mortgage in fee, the legal estate continues in the mortgagee as a trustee for the person entitled to the equity of redemption till the effluxion of twenty years; when that time has elapsed, he ceases to be trustee for the mortgagor, and becomes trustee for him who has been in possession twenty years, instead of being trustee for him, by whose laches, that long possession has been permitted.

Qualification of rule in text.

(X) Where he will be decreed to make satisfaction, 1 T. R. 771, et vide p. 477, post, n. (A).

would, at least, be saddled with costs, which may prove a very serious consideration to him; it is therefore most prudent in such case to decline acting, unless upon very sure grounds, if it be not with the direction, and under the indemnity of a court of equity.

Term should be assigned to mortgagee's own trustee (y);

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or, mortgagee should have possession of deeds creating, and assigning term.

From what has been observed, it seems prudent for mortgagees, in all cases where it can be done, to take assignments of terms to trustees nominated by themselves, rather than to leave such terms outstanding in strangers; but cases sometimes arise in which this cannot be accomplished. Frequently it becomes impracticable, after a length of time, to find out the representatives of such trustees, in which case the owner cannot get in a complete title. In such cases the next best alternative is to be taken, which is to secure the possession of the title-deeds, taking particular care that he has the deed creating the trust term, and that by which it is assigned (z). A pur-

Term should be actually assigned.

(Y) It is the general practice to recommend an actual assignment of the term, in preference to a mere declaration. But Lord Eldon doubted, whether it was possible upon principle to say, that an assignment of a term, which has been once assigned to attend the inheritance, is necessary from time to time whenever that inheritance is made the subject of mortgage or purchase. *Maundrell v. Maundrell*, 10 Ves. 259. But see p. 510, 5th sect. of note there. Et ante, p. 451, n.

Lord Hardwicke's approval of mere declaration as distinguished from actual assignment.

(Z) "Where the assignment," says Lord Hardwicke, (1 T. R. 772) "has been in trust to attend the inheritance generally, and the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where the title-deeds always are or ought to be taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him."

Possession of deed creating term, and declaration of trust by trustees, gives preference.

In *Stanhope v. Earl Verney*, 2 Eden, 81. S. C. ante, 57, the custody of the deeds creating a term by a second incumbrancer, who had no notice of the prior mortgage, accompanied with a declaration of trust of the term by the trustees, was held to give such second incumbrancer an advantage over the first incumbrancer, of which a court of equity would not deprive him; and the person claiming under the second incumbrancer, upon purchasing the equity of redemption from the mortgagor, was held not to have relinquished such advantage, by having covenanted to retain part of the purchase money to redeem the prior mortgage, as it was also agreed that he might use the money adversariously, in case he could not adjust the matter amicably. Lord Northington, alluding to the paramount importance of procuring control over the legal estate, said, that no man would purchase lands but by advice of counsel; and if you could not safely purchase with the legal estate, counsel

chaser for a valuable consideration, having these in his possession, seems to be in no great danger from the term being outstanding; because it can never be set up against him but by a purchaser for a valuable consideration without notice, who gets an assignment of the legal estate in the term; and the fact of a purchaser taking an estate without the title-deeds, is, *prima facie*, at least, a ground to presume notice against him, if not to make his purchase fraudulent.

But should a case arise in which the non-possession of the title-deeds, and amongst others of the deeds creating the term, and the deed assigning it, can be accounted for in a satisfactory manner, either by such purchaser having had a probable cause assigned him, from whence he may presume that there was no title-deeds belonging to the estate, or of an incumbrancer taking his estate from one who had no right to the title-deeds, and who, therefore, could not give them up as a mortgagor of a reversion, the title-deeds in such case belonging to the tenant for life; it does not appear to me, that the possession of the title-deeds, though comprising among them both the deed creating and the deed assigning the term, would be a good defence against a prior purchaser or incumbrancer for a valuable consideration without notice, who should get an actual assignment of such term from the person in whom the legal estate therein should be vested (A).

Possession of deeds creating term, no defence in ejectment, against mortgagee without notice who has an assignment.

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would not advise you, and you could not purchase at all. It is also observable, that in *Kensington Ex parte*, 2 Ves. & Bea. 83, the Lord Chancellor laid it down as a general rule, that the court would not take away the deeds from a subsequent incumbrancer in favor of a prior one, but would allow him all the benefit he could derive from those deeds, nevertheless giving him no interest in the estate; and his Lordship added, that a decision of that sort by Lord Thurlow, in *Russell v. Russell*, 1 Bro. C. C. 269, had been followed ever since his time. See vide what is said in the next page and note, Section V. as to relying on a declaration of trust and possession of the deeds only.

(A) At law the legal estate would indubitably prevail; but the difficulty is, how can the person, who claims the benefit of this legal protection, deduce his title to the legal estate, when the best and only evidence respecting it is in the hands of his adversary? A court of equity would certainly not compel the party, who has the deeds, to produce them to his own prejudice (see vol. ii. p. 641); and at law the plaintiff must rely entirely on the strength of his own title, which in fact he cannot prove without the assistance of his opponent; and it would be in vain to expect any aid from an avowed antagonist.

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Legal estate without deeds, difficulty in proving title.

Situation of trustee, who assigns to B. when A. has deeds.

The truth seems to be, that the parties have disabled each other; the one cannot make good his title for the want of evidence; and the other has an abundance of proof if he had but the legal estate. The question then resolves itself into this, which party has the most equity? Lord Eldon thought the person, who was in possession of the title-deeds, was entitled to preference. Disliking, he observes in *Knott Ex parte*, 11 Ves. 613, the whole doctrine, he examined every part of it with jealousy, in *Maundrell v. Maundrell*, 10 Ves. 246. S. C. 7 Ves. 567. It went upon this, that if the purchaser had got the original title-deed to the term, the court would not be satisfied that there was any truth in the assertion, that the legal estate was in the person who the adversary said had it [namely, for instance, his own trustee]. Lord Hardwicke thought you could not, in many cases, trace the representative; but if the purchaser used so much diligence as to take possession of the deed, a court of equity ought not to compel him to produce that deed to his prejudice. It was not determined what was the situation of the trustee who made the assignment. Lord Hardwicke said, the question was, not whether the trustee should be punished, but whether the purchaser should hold under a breach of trust? That, Lord Eldon conceived to be strange doctrine; and he desired to be understood that he had not made up his mind, that the court would not restrain the trustees from permitting their names to be used. From some saving expressions he did not conceive that Lord Hardwicke meant to determine that the trustee, aware of the prior incumbrance, would be safe in making the assignment to a subsequent incumbrancer. One of the greatest difficulties Lord Eldon met with in deciding the case of *Maundrell v. Maundrell* was Lord Hardwicke's expression, that the purchaser would be safe in taking the assignment if he could get it; but Lord Hardwicke would not say that the trustee would be safe. But surely, added Lord Eldon, if the purchaser would be safe, the trustee ought to be so too.—On the original question, therefore, the learned reader must draw his own conclusion. An action of trover for the deeds creating and assigning the term, or a bill in equity for a discovery and production of those deeds, are, it is conceived, the only remedies open to the party having the legal estate, by which means he may obtain the evidence he seeks. See, for a case somewhat similar, post, vol. ii. 647; and generally, for the production of deeds, vol. ii. p. 633, n. *et seq.*

Design and division of note.

The doctrine of attendant terms has received some variation from the modern determinations, especially as it regards presuming the surrender of terms, which, with a short recapitulation or epitome of the whole learning on this head of law, it will be the attempt of this note to delineate. It is proposed to consider,

- I. The rise and progress of attendant terms, with the mode and manner of their attendancy.
- II. The cases wherein terms will attend by implication.
- III. The protection afforded by attendant terms.
- IV. Of what terms a purchaser or mortgagee may require an assignment.
- V. The cases wherein such assignment may be dispensed with; and,
- VI. Various other matters relating to attendant terms, as abridged in the margin of this section.

Rise of attendant terms.

- I. Of the rise and progress of attendant terms.—One of the first cases wherein attendant terms are noticed, is that of *Freeman v. Barnes*, adjudged

If the prior incumbrance attach upon part of the estates comprised in the latter mortgage only, it will not protect more Prior incumbrance protects that part of estate only which it comprises.

in Banco Regis, Anno 21 Car. 2. 1 Vent. 55. 80. S. C. 1 Lev. 170; and from that period, and even then, attendant terms are familiarly spoken of in the reports. Attendant terms are mere creatures of equity; *at law every term is a term in gross*. Attendant terms are said to have been invented to keep estates in a right channel, and to preserve the dominion of real property entire. But they arose in a great measure from a principle of favor, which the Court of Chancery has uniformly shewn to purchasers and mortgagees, as a stimulus perhaps to the purchase and transfer of landed property. A purchaser is a great favorite in a court of equity. Thus Lord Keeper Finch, in the twenty-fifth year of the same reign, said, a purchaser *bonâ fide*, without notice of any defect in his title at the time of the purchase, might lawfully buy in a statute or mortgage or any other incumbrance; and if he could defend himself at law, by any such incumbrances bought in, his adversary should never be aided in a court of equity by setting aside such incumbrances; for equity would not disarm a purchaser, but assist him: and precedents of this nature were very ancient and numerous, (*viz.*) where the court had refused to give any assistance against a purchaser, either to an heir or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another; and this rule, added his Lordship, in a court of equity, was agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and inventions of the law, to protect the possession and to strengthen the rights of purchasers. *Basset v. Nosworthy*, Finch, 102. S. C. post, vol. ii. 642. From that period to the present time attendant terms have become an object of great care with conveyancers, by whose practice alone the doctrines relating to them were, for a considerable time, almost entirely regulated.

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Purchaser a
favorite.

Equity will not
disarm him.

The mode and manner of the attendancy of terms will be best explained by considering the interests of the parties separately, and then the union and amalgamation of these interests together, either as that union is effected by construction in equity, or by express declaration. In the case of an attendant term there is simply and individually, first, an empty legal term; second, a legal and beneficial reversion; third, an equitable estate of freehold and inheritance during the continuance of the term; and, fourth, a trust of the term. The second and third of these interests are generally united in one person, the third merging in the second; the owner thereby becoming possessed of the whole equitable estate of freehold and inheritance in fee-simple, and also of the legal estate of the reversion in fee at the same time: so that by this compound a fifth species of interest is created. When the *cestui que trust* of the term is the same person who has this fifth interest or estate, the equitable interest in the term is extinguished in the equitable estate of freehold and inheritance, and descends with it, becoming subject to the same rules, and liable to the same incidents as the equitable freehold and inheritance are subject and liable to; but the nominal legal freehold during the term resides in the person who is entitled to the reversion.

Manner in
which terms at-
tend inherit-
ance.

II. Of the attendancy of terms by implication or construction in equity.— General rule as to terms attend-
This head has been amply treated of by the learned author, see ante, 458.

than what is comprised in the first security. And therefore,

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ing by implication.

Trustee holds term for equitable incumbrancers according to priority.

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Distinction between express and implied attendancy as to notice.

Advantage of term,

It is consequently merely requisite to state here, that where a term has been created for a particular purpose, and that purpose has been satisfied, then if the instrument does not provide for the cesser of the term when the purpose of its creation is at an end, the term will remain without any object to which it can be applied, and the beneficial interest in it will become a creature of equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When that proposition is established, says Lord Eldon, in *Maunderell v. Maunderell*, 10 Ves. 260, it seems quite obvious, that where the persons claiming, subject to the term, claim all under contract, whether there is an assignment of the term or not, as to those who stand behind, *qui prior est in tempore potior est in jure* is the applicable maxim; and the trustee of the term is a trustee for them, according to their priorities.—As a general rule it may be laid down, that in all cases where the term and the freehold would, if legal estates, merge by being vested in the same person, the term in equity will be construed to be attendant on the inheritance, unless there be a declaration or other act to evince an intention to sever them. *Kelly v. Power*, 2 Ball & Bea. 255. *Capel v. Girdler*, 9 Ves. 509. In a subsequent part of this work (see pages 613, 15, post) the learned author in effect makes a very important distinction between a term assigned on an express trust, and a term attendant by construction in equity merely. He contends, that where a purchaser of the inheritance obtains a term in gross, the purposes of whose creation were not answered at the time of the purchase; or a term, the purposes of whose creation were answered, but which had not been expressly assigned to attend the inheritance, but merely waited upon the freehold by construction of equity, such purchaser can defend his possession by the term, although he have notice of an intervening judgment at the time of his purchase. This will be observed upon in due course (see *circiter*, vol. ii. 615, post.)

III. The term being clearly attendant, either by express declaration or by implication in equity, we proceed to consider what benefit will accrue to the parties by a term so attending.

1st. The advantage derivable from attendant terms is obviously displayed in the security which such terms afford to purchasers and mortgagees. Thus, if a *bonâ fide* purchaser or mortgagee happen to take a defective conveyance or mortgage—defective either by reason of some prior conveyance, or of some prior charge or incumbrance, or for want of some solemnity in the execution of a power, or on account of some irregularity in the passing a fine, suffering a recovery, or surrendering a copyhold estate, or for any other reason whatever, whereby he shall acquire merely an equitable title, as distinguished from a legal estate, then if he have also taken an assignment of an outstanding term to a trustee for himself, he will have enough under his own command to cure the defect substantially; for he will be entitled to the legal estate during the term in preference to any other creditor, of whose charge or incumbrance he shall not have had notice at or before the time of completing his contract for the purchase or mortgage; and he may use such term either to defend his possession, or to recover it at common law when lost, though his adversary

if a man, being seised of sixty acres (l), mortgage twenty to A:

(l) Per Lord Hale, 2 Vent. 339.

may perhaps have the strict legal title to the inheritance. See ante, p. 468. So a term will protect against an act of bankruptcy, as in *Wilkes v. Bodington*, (2 Vern. 599. S.C. post, vol. ii. 594) where there was, first, an act of bankruptcy by A.; second, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and, third, a commission against him,—although the commission over-reached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the act of bankruptcy; et vide *Collett v. De Golls*, Forr. 65. The protection arising from a term of years, assigned to a trustee for a purchaser, will extend generally to all estates, charges, and incumbrances, created intermediately between the raising of the term, and the time of purchase. This was Lord Hardwicke's opinion in 1 T. R. 758 (and ante, 469); and unqualified as it is, says Mr. Sugden, it seems correct; for as the term will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee. Sug. Ven. & Pur. 372, 5th edit.

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is a shield
against bank-
ruptcy;

and protects
against all other
charges and in-
cumbrances,

2d. Previously to the case of *King v. Smith*, ubi supra, it was the prevailing opinion of the profession, that an attendant term of years would protect a *bonâ fide* purchaser or mortgagee against crown debts, of which he had no notice at the time of his mortgage or purchase. And this opinion, says Mr. Preston, had long regulated the practice of the profession. 3 Pres. Conv. 465. The opinions given by Sir James Mansfield, late C. J. C. P., and Lord Kenyon, when they were at the bar, are generally referred to as supporting this doctrine. But, it is observable, that Lord Kenyon's opinion seems to have been founded, in a great measure, on that of Sir James Mansfield's; and Sir James Mansfield once thought differently: and when he inclined to the side of the mortgagee (for he gave no express opinion on the subject), it was in consequence, not of any judicial determination or reasoning on the adjudged cases or principles of law, but of information he had received in answer to a search directed by him, that no instances were to be found in which a trust estate of such debtor, fairly parted with to a purchaser without notice, had been deemed to be liable to the debts of the crown (for the plain reason, perhaps, that no such instance had occurred within the recollection of the searching officer of the Exchequer). On writing his first opinion, he made a similar inquiry; and it was then represented to him, that estates held in trust for a debtor of the crown were usually seised under extents, and were considered as bound by his debts in the same manner as those of which he was legally seised. On this authority he gave an opinion in favor of the right of the crown to extend lands in the hands of a mortgagee, although the legal estate had never vested in the mortgagor, but had been conveyed to the mortgagee by trustees, in whom it had been vested in trust for the mortgagor. On the credit of a second search and a different result, Sir James Mansfield, as before observed; gave a different opinion; therein exhibiting the fickle principle by which his judgment was guided. It is consequently very difficult

except crown
debts by spe-
cialty.

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and then the whole to B. and then the whole to C. and after-

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to conceive, with Mr. Sugden, how the point can "be said to have received what was tantamount to a judicial decision previously to the determination of the Court of Exchequer in *King v. Smith*," which decision, it is sufficient to state here, in general, was in opposition to the opinions given by Lord Kenyon and Sir James Mansfield.

King v. Smith.

*Trust estates
subject to ex-
tents.*

*So trust of term
may be extend-
ed.*

In *King v. Smith* the question was, whether an outstanding term, created long before the vendor's possession of the estate, and of which the purchaser had procured an assignment, would or would not protect him against specialty debts due from the vendor to the crown, whereof the purchaser had no notice at the time of his purchase? The Lord Chief Baron M'Donald, in delivering the judgment of the court on the question, stated, from a variety of authorities he had found, that lands or goods in the hands of debtors or accountants to the crown, or in the hands of those who were debtors to the debtors of the crown, or *which were held in trust for them*, or to their use, were most clearly the subject of an extent; and, in a subsequent part of his judgment, after citing and commenting on several cases, his Lordship observed, that there were several other cases cited in *Sir Edward Coke's case*, and which were also mentioned by Lord Hale in the case to which he had already alluded. In a great many of these cases the lands that were seised for the payment of debts due to the crown, had been held in trust for the king's debtors, and it was no objection that the legal estate was not in them, for by an act of their own they might at any time reduce it into possession; they had it in their power, viz. by a subpoena in Chancery, &c. to compel their friends to settle the legal estate of the lands upon them; and, therefore, they were made chargeable to the debt. The term in the case before him being an outstanding term held in trust, it was analogous to all the cases of uses and trusts. But the case that came nearest to the present, was that of *Attorney-General v. Sir George Sands*, Hard. 488. 2 Freem. 3, which the Chief Baron stated at large, and concluded by declaring, that in deciding according to the course of the common law, he thought it clear, that *an outstanding term could not defeat the king's process by extent*. In courts of equity it had been said, that a purchaser without notice was a person favored by that court. Perhaps it might be a sufficient answer to say, that in the present instance they were not in a court of equity. The question was, what ought to be their decision according to the common law. This question could not be decided in a court of equity; the parties could not sue for a decree. When a court of equity is resorted to, and this is the situation of the parties, the court did nothing but stand neuter between such parties, and left them to make the most of it; and on the whole, the Lord Chief Baron thought, that in the first place the lands in the hands of the king's debtor were chargeable with the specialty debt; and from the decided cases he considered it sufficiently clear that *the term was too*. Of the king's common law remedy it was impossible to doubt, *and that remedy was given in every case where the party indebted to the crown had a present beneficial interest as well as a reversion*: both of these were considered as chargeable for the debt of the crown; *the lands of the king's debtor might be*

wards C. purchase in the first mortgage, *that* shall not protect

extended by the crown, in whatever hands they might be found; and, therefore, the judgment of the court ought to be for the crown, which was given accordingly. King v. Smith, Sug. Ven. & Pur. Appendix, No. xvi.

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In a subsequent stage of this case, (Wightw. Rep. 34) the Court of Exchequer, after a solemn argument and full consideration of the case, held, that a simple contract debt due to the crown would not bind the land of the debtor in the hands of a *bonâ fide* purchaser.

Simple contract
crown debts no
lien on land.

In another case, (*King v. St John*, 2 Pri. 317) where D., by articles bearing date in 1796, in consideration of his intended marriage, covenanted to settle lands, to be purchased with a certain sum of money, to uses in strict settlement; and in 1808, entered into bonds to the crown, and in 1812, purchased lands generally in fee; a mortgage term being assigned to a trustee to attend the inheritance, and the estate being then settled in strict settlement to the uses declared by the said articles, under which D. himself took only a life interest. It was held, that the term did not protect the inheritance against the crown debt due from B. on the bonds, because, said Thompson, C. B., the settlement of 1812 was voluntary, and there was no covenant in the articles of 1796 which specially bound the lands: the assignment of the term, therefore, to St. John, could not defeat the right of the crown.—It hath been inferred from this case, that if the settlement had not been voluntary, the term would have protected the inheritance from the debt due to the crown. This inference we are certainly not entitled to draw, because two cases were cited; namely, *How v. Nicholls*, and *King v. Smith*, *ubi supra*, which furnished two different grounds for the decision, beside the principle on which the court proceeded; and it was sufficient for the Chief Baron to state a substantial ground for his decision (which by the way did not appear to have suggested itself to the counsel who argued the case), without referring to other authorities, whereon the determination of the court might have as firmly rested.

Term no pro-
tection against
crown debts in
favor of volun-
teer at least.

And here it may be useful to notice a distinction between the cases, where the extent issues against the king's debtor, at a time when he has the estate in his own possession with an outstanding term attending the inheritance in his own trustee, and where the extent issues after such debtor has parted with the inheritance to a *bonâ fide* purchaser, who at the time of his purchase had no notice of any crown debt or any lien of the crown, and which purchaser has taken an actual assignment of the term to a trustee of his own nomination. Although there is an evident diversity between these cases, and such as should seem, according to the principle of those who consider the purchaser for value and without notice to be placed beyond the power of courts, to call for a different application of law. Yet the decided cases shew, that in neither instance will the term afford any protection to either tenant.

No distinction
where extent
issues, when
debtor has lands
in his own pos-
session, and
where it issues
when he has
sold them.

In *Sir Gerrard Fleetwood's Case*, 8 Co. 340, Sir W. Fleetwood, being possessed of a house and lands at Harrow, for a certain term of years then yet during, became Receiver-General of the Court of Wards, and entered into twenty bonds to render a perfect yearly account, &c.; and being so indebted, he assigned the said lease for 1100*l.* to James Pemberton, who entered, and afterwards sold the premises to Sir Gerrard Fleetwood. The question was, whether the said messuages and lands were extendable or liable to the king's

Term in gross
assignable *bonâ
fide* against
crown.

more than the twenty acres; but it shall protect those twenty acres, so as B. shall never recover them, until he pay C. all the money due upon the first and last mortgage.

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debt; and although it was at the election of the sheriff, either *to extend or to sell a lease so long as it remained in the debtor's hands*, as appeared in the books of 31 Ass. p. 6. '38 *ibid.* p. 4. 44 E. 3. 16, and 7 H. 6. 2, yet it was resolved, that the said sale of the term should bind the king, because the term was but a chattel, and there was no covin in the case; and it was held, that a sale *bonâ fide* of chattels was good after judgment, but not after execution awarded: as appeared in 2 H. 4. 14. *Per cur.* 9 H. 6. 58. 11 H. 4. 7. Et vide 2 Roll. 157, and Cro. Jac. 451. 1 Leo. 145, and Keilw. 87 a. But from *Ford and Sheldon's Case*, 12 Co. 2, 3, it appears, that if such sale of a chattel were not *bonâ fide* the king would not be bound.

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Attendant term no protection to king's debtor, but disannexed and mortgaged, it will protect mortgagee.

There is also a case of *Howse v. Mitchell*, or *Nicholl v. How*, reported in Pre. Ch. 125, and 2 Vern. 389, which directly bears on the point under consideration, and shews, that in general where a term is attendant on the inheritance, if the king extends the inheritance, he shall have a right to the term also. A man there having a term in gross, purchased the reversion in fee, whereupon the term was declared to attend the inheritance: he then became receiver of the king's revenue; and it was held, that he was liable from the time of his becoming receiver, and that the king should have the benefit of the term; but it was said, that if the term had been mortgaged to one who had no notice of its attending the inheritance, he should have held it against the king, [because the term would then have been disannexed and have become a term in gross, and consequently have fallen within the doctrine which governed the court in *Sir Gerrard Fleetwood's Case*, *ubi supra*.]

King v. Smith considered.

The principles of natural justice evidently dictate, that a *bonâ fide* purchaser without notice of the claim of the crown, whether he have an attendant term or not, should be protected from latent incumbrances which he has not the means of discovering. Yet, on the other hand, it is of the first importance to the well-being of society, that the king's revenue, which is collected for the maintenance and orderly government of the community, should not be wasted by improvident collectors; who in the first place convey away their own property (fraudulently certainly, if they do not inform the purchaser of the lien they have created on the estate), and then impoverish the funds of the crown, with which in confidence they have been entrusted. Mr. Sugden has endeavoured to shew, that the case of *King v. Smith* is inconsistent with principle, but with doubtful success, for the two grounds of that decision which he places beside the case (see his *Ven. & Pur.* 374, 5th edit.) were in fact more relied on in the report than the case of *Attorney-General v. Sands*, upon which Mr. Sugden conceives the decree in *King v. Smith* was principally built. The case is a standing authority, see 1 Madd. Ch. 537, 2d edit. and 3 Pres. Abst. 305, 306, in which latter place it is pointedly remarked, that in consequence of the lien of the crown attaching on equitable as well as legal estates. the plea of being a purchaser for valuable consideration without notice, will not avail against the crown; and a purchaser, though thus favorably circum-

Mr. Sugden's attack thereon.

And so it was determined in the case of *Marsh v. Lee* (m).

Prior mortgage attaching on other lands, subsequent incumbrancer may hold all till sa.

But, if the prior incumbrance bought in, attach upon other estates, as well as upon those affected by the subsequent mort-

(m) 2 Vent. 337. Supra, 453, 4.

stanced, cannot use an attendant term for his protection against the crown, citing *King v. Smith*, ubi supra.

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The same learned writer in another work observes, (3 Pres. Con. 466) "It is impossible for the crown to impeach the legal operation of the assignment; and it is singular, that if the debtor had been the owner of the legal estate in the term, his assignment prior to the teste of the writ of extent, would have prevailed against the crown. *Sir Gerrard Fleetwood's Case*, 8 Rep. 171. [8 Co. 340, is the correct reference.] The sole ground, therefore, of supporting the decision [in *King v. Smith*] is, that the crown follows the trust of the inheritance, and not the trust of the term, except so far as it is part of the inheritance; and that the legal estate conferred by the term will not protect a purchaser for valuable consideration and without notice from the lien, or demand of the crown, attaching on the inheritance, as consisting partly of the legal estate of inheritance, and partly of the benefit of the trust of the term." On this it is to be observed, that if in the singular case alluded to, the term in the debtor had been to attend the inheritance which he had in a trustee, then an assignment of such an attendant term before the teste of the writ, would not, it is submitted, have prevailed against the lien of the crown. The reason why a term in gross is assignable against the crown prior to the teste of the writ of extent is, because it is in the nature of a personal chattel, over which, as over all other goods and chattels of the debtor, the lien of the crown does not extend until the teste of the writ of execution. But a term to attend the inheritance is very different. It is part of the inheritance consolidated with it, and is in the nature of real estate, it belongs to the heir or devisee, is not bequeathable by will unattested, is real assets, and as against the heir and assignee in bankruptcy, is subject to dower and curtesy; and therefore, though it be a rule in law, that every term is a term in gross, yet since courts of law do, when the property of the crown is endangered, look to equitable as well as to legal estates, it seems difficult to contend, that an assignment of the legal estate of an attendant term prior to the teste of the writ of extent, would prevail against the crown. It is also observable, that it appears to be a very refined ground for supporting the decision in *King v. Smith*, to say, "that the crown follows the trust of the inheritance, and not the trust of the term, except so far as it is part of the inheritance;" when in fact there is not at law any trust of the inheritance in the case of an attendant term. The *cestui que trust* has the legal estate in fee-simple in the reversion and no trust, the trust concerns the term merely, and not the inheritance. In equity a different construction prevails; but *King v. Smith* was a case at common law, and, it is presumed, that the reasons stated by the Chief Baron for the judgment of the court in that case are amply sufficient,

Mr. Preston's ground for reconciling decision in *King v. Smith* considered.

ained in his mortgage, and is forfeited at law, it is but rea-

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*Reasons for
opinion that it
will.*

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have so essentially varied the case, and have produced a decision the very reverse from the one pronounced.

Considering the case on principle, it may be asked, does the protection against dower by means of an attendant term, depend on the state of the wife's right to dower, whether that right be consummate or inchoate? Has a distinction as to the different stages of the wife's right of dower been mentioned in any of the adjudications on this subject? Does not the protection which attendant terms afford, arise from a principle of favor shewn to purchasers and mortgagees, whereby they are allowed to use the term as a shield against every incumbrance; and is not dower in its consummate state, by reason of the husband's death, as great and even a greater incumbrance than dower inchoate, during the husband's life-time, and the more to be protected against, because it is then an actual incumbrance, whereas the wife's right to dower, during the husband's life-time, exhibits merely a chance of incumbrance? And it may be further asked, is the interest of the wife at all regarded in questions of this kind? Is she not in a worse condition than any other species of incumbrancer; for, even supposing the purchaser or mortgagee to have notice of the dower, he will not be bound by it, if he can procure an assignment of an outstanding term created prior to the marriage? Can then the death of the vendor before an actual assignment of the term (provided the term be assigned after his death) vary the case? Does the want of assignment before the husband's death, furnish any ground for withdrawing from the purchaser or mortgagee that favor and protection which it is acknowledged has been uniformly shewn him, or rather does it not give the purchaser or mortgagee greater claim to the favor and protection of the court, when the dower, like a judgment or mortgage, assumes the hostile character of an actual charge on the property, especially when the purchaser or mortgagee has committed no act whereby to forfeit that favor and protection, but, on the contrary, has, by his superior diligence, acquired in to a trustee of his own nomination, the legal estate in the term? If the widow should obtain an actual assignment of the term after her husband's death, she would certainly prevail against the purchaser or mortgagee; and so it is submitted, the rule would be held in favor of the purchaser or mortgagee, if he could procure an assignment of the term before the widow.

*Objection to
that opinion
answered.*

But one principal difficulty in allowing the purchaser or mortgagee to prevail against the widow, would be to overcome the prejudice which may perhaps arise, by considering the incompatibility of such a rule with the general principles which govern courts of equity in reference to the doctrine of notice. That doctrine, however, seems entirely laid aside in questions of this kind; and therefore, it is conceived, no ground of objection ought to arise from that quarter. It may indeed be contended, and as it should seem with greater effect, that as the trust of the term attends all the modifications of the inheritance, and as the purchaser or mortgagee has not changed the equity by procuring a cessation of the old trust and the creation of a new one expressly for his benefit before the husband's death, the widow will be entitled to the trust of the term in preference to the purchaser or mortgagee, dating the period

sonable that the estate, which by no method can be evicted at

from whence her right to the term commenced prior to that of such purchaser or mortgagee, namely, the date of her marriage. And this argument may perhaps assume something of an imposing aspect, provided notice of the husband's death could be proved on the trustee previously to his assignment of the term. To this argument it is conceded, that on her husband's death the widow would probably have the best right to call for an assignment of the term; but if the purchaser or mortgagee wins the race by procuring an actual assignment before her, it is conceived a court would not take from him any advantage which he might thereby acquire: and notwithstanding even actual notice to the trustee of the husband's death, that cannot affect the purchaser or mortgagee, but only the trustee himself for the breach of trust which he has committed, by assigning the term in direct opposition to the rule laid down in a previous page of the text, for which see ante, p. 475.

But though the editor individually submits that the court should, in a case of this sort, to be consistent with its own decisions and especially that of *Wynn v. Williams*, ubi supra, decree, that an assignment *after* the husband's death of the legal estate in a term for years, created previously to the marriage, would effectually prevent the wife from being endowed during the remainder of the term, yet it should be recollected that the above quotation from the learned editor's notes to *Watk. Elem. Conv.* (to which the greatest respect is due) stands in direct opposition to that conception of the rule; and that the court has uniformly disapproved of a doctrine which has debarred the wife of her marital rights, where the assignment of the term has been procured after marriage, and with full notice of the dower, declaring, that it is a doctrine unsupported by principle, and such as ought rather to be narrowed than extended. Add to this also, that it appears to be the general understanding in practice, that in order to protect a purchaser against dower, the term must be actually assigned *before* the death of the husband.—In *Hill v. Adams*, 2 Atk. 208. (S. C. sub nomine *Swannock v. Lyfford*, Amb. 6. Butl. Co. Lit. 208 b. n. 1. and post, vol. ii. 686, Ld. Hardwicke is reported to have said, “if the husband had paid off the mortgage and taken an assignment of the term to attend the incumbrance, and died seised, the wife would have been endowed; but if a purchaser come in *after the mortgage is paid off and the death of the husband*, and takes an assignment of the term, that would prevent dower.” If this can be relied on, it certainly points to an opinion, that an assignment *after* the husband's death will prevent dower. But it is more than probable that the passage in italics is a misprint, and that the word “before” was intended to precede the words, “the death of the husband,” thus, “but if a purchaser come in *after the mortgage is paid off and before the death of the husband*, and takes an assignment of the term, that will prevent dower.” Consequently, nothing can be inferred from the case as to the point in question, except perhaps that Lord Hardwicke may fairly be said to be of opinion, that an assignment of the term *after* the death of the husband will be of no avail to the purchaser or mortgagee. But it should be borne in mind, that if this opinion can be attributed to his Lordship, it is an *obiter* opinion, and that the language of the report will submit to the alteration of the word “and” into “or,” as well,

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*Reasons for
doubting whe-
ther terms as-
signed after
husband's death
will protect
against dower.*

*An equivocal
case.*

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law, should not be taken away by the mesne incumbrances in

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as to the introduction of the word "before" in the place suggested. On the whole case, therefore, the learned reader must be left to form his own conclusion.

If term, created just before marriage, will protect against dower.

The rule that a term created before marriage will bar the wife of dower, may be converted to very inequitable purposes. Thus (Show. Par. Ca. 71,) Serjeant Maynard, the day before his last marriage, made a lease to his servant, thereby preventing the right of dower attaching on his freehold estates during the term, except on the rent, if any were reserved. The probabilities were, that the wife would be dead before the expiration of the term, and then the term might be merged, the purposes of it being answered. So a person might create a term to exist so long as his intended wife should live, and then to cease, which would effectually defeat the wife of dower, and perhaps of a jointure. In *Swannock v. Lyfford*, Butl. n.(1) to Co. Litt. 208, a, and see 2 P.Wms. 709, Lord Hardwicke seems to have considered it clear, and it was admitted at the bar, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower. But the counsel for the respondent, in *Radnor v. Vandebendy*, Show. P. C. 69, submitted in argument, that if a husband just before marriage makes a long lease on purpose to prevent dower, and the woman expecting the privileges which the common law gives to women married, survives him, *equity may interpose*. And it is observable, that this doctrine of the court's interference, in a case of this kind, has been distinctly recognized by Lord C. B. Gilbert (*Lex pratoria*, 267,) and as it seems with good reason; for, on the other hand, if a woman freeholder were to execute a private conveyance to trustees before marriage, in trust for her separate use, without notice to her intended husband, the settlement would be clearly voluntary and void as against the husband, he being, by the marriage, in the character of a subsequent purchaser for value. A legal term, therefore, created in contemplation of marriage, for the express purpose of defrauding the wife of her just rights, cannot, it is apprehended, be depended on as a sure ground for answering the effect intended.

Necessity of procuring assignment of prior legal term.

4th. From the preceding observations it should appear, that a purchaser or mortgagee obtaining the assignment of an outstanding term, will, under most circumstances, be secure against all estates, charges, and incumbrances, except crown debts by specialty, created immediately between the time of granting the term and the period of the purchase or mortgage. But a purchaser or mortgagee, to avail himself of the benefit of such outstanding term, must have paid or advanced a valuable consideration,—his purchase or mortgage must have been fair,—he must have had no notice either express or implied, and have—the first and best right to call for the legal estate of the term. Hence arises the necessity of procuring an assignment of all outstanding terms. A term assigned for the benefit of a purchaser or mortgagee is a shield in his hands; if suffered to remain at the disposal of other persons, it may be used as a weapon against him. In mortgage transactions especially, it is of paramount importance to obtain an assignment of all outstanding terms; for the term carrying the right to the possession, and the legal estate being the only

a court of equity; unless such persons do equity, and pay the

ground which will support an ejectment, the first mortgage may be completely over-reached and defeated by a puisne incumbrancer, who has obtained an actual assignment of the term. Hence also the disadvantage of accepting mortgages depending on equitable titles, not protected by the legal estate, which confers a right to the possession. As to purchasers, the disadvantage of leaving a legal term outstanding is, that the purchaser may not, perhaps, possess the full enjoyment of his property, and at some future period he may be obliged to acquire in the term at his own expence.

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IV. We are next to inquire of what terms a purchaser or mortgagee may require the assignment, and without which he may refuse specific performance of his contract?

*Of what terms
assignment may
be required.*

The answer to this question is, that he may require the assignment of all terms which confer a title to the legal estate, and of which he can avail himself in ejectment. It follows, therefore, that *equitable* terms, such as are created by the owner of the equitable fee, are *not* necessary to be assigned to attend the inheritance, as they can afford no protection to the purchaser or mortgagee, and will not by the devolution of the legal estate on the equitable owner become legal terms. It may, however, in some cases, be useful to take an assignment of such terms; for a purchaser or mortgagee may avail himself of the benefit of such equitable terms as legal estates, until it be shewn that they are equitable interest. The position that a purchaser or mortgagee may require the assignment of all terms which are available in ejectment, naturally leads us to inquire what terms may be used in ejectment? In answer to this inquiry, it is observable, that the term must be of the legal estate, and not barred, merged, extinguished by proviso of cesser, nor presumed to be surrendered. Each of these in their order,

*Not of equit-
able terms.*

Subdivision.

1st. The term must not have been *barred* by fine, recovery, or other assurance of the *cestui que trust*. To explain this, it may be necessary to premise, that terms for years outstanding to protect the inheritance, and conferring titles to the legal estate, are subject to all those rules by which terms in gross, vested in strangers are governed. *Prima facie* the possession of the *cestui que trust* is the possession of the termor, and an entry made or fine levied by the *cestui que trust*, will leave the title of the termor unaffected; *Freeman v. Barnes*, 1 Vent. 80. S. C. 1 Lev. 270. 1 Sid. 349. *Smith v. Pierce*, Carth. 100. *Focus v. Salisbury*, *infra*, 536. *Baskett v. Pierce*, 1 Vern. 226, except perhaps in those instances in which there is a clear intention, on the part of the *cestui que trust*, to assert a right of possession in disaffirmance of the title under the term. Two propositions therefore seem to flow from this statement of the law, first, the person for whose benefit the term is attendant, may, if he thinks fit, make an actual entry or a feoffment, or being in possession, may by a claim or express declaration oust the termor, or disaffirm his title, and by that means convert the term into a right of entry; and a right of entry cannot be assigned, because it is a chose in action. Second, when a term is converted into a right of entry, it *may be barred by non-claim on a fine*. The use therefore of the entry, the feoffment, or the claim, is to dispossess the termor, and change his estate into a mere right of entry; and the use of the fine is to bar the title under the term by non-claim on the fine at an earlier period than

*Of barring out-
standing terms
by fine and non-
claim.*

whole money due on both securities. And therefore, where

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it could be barred by the statute of limitations on a feoffment or recovery. And the advantage to a purchaser or mortgagee is, that the terms are placed on such a footing that they cannot be assigned without an entry to avoid the fine, and consequently notice of the person who asserts title under the term; and in process of time the title will be barred by the operation of the statute of non-claim on fines, or by the statute of limitations if a charter of feoffment be delivered or a recovery suffered. There is one case, however, to which this doctrine cannot be applied, and that is in the instance of a term which vests in a person who dies intestate, so that there is a suspension of the title under the term for want of an administration of the goods and chattels of the termor, at least *quoad* the term; for an entry, a feoffment, a claim, or a fine, would leave the title under a term thus circumstanced, in the same state as it was at the time when the entry, claim, or feoffment was made or fine levied. The plan of acquiring the freehold by means of a fine and feoffment forms a very old head of law, and supported by sound authority, see Co. Litt. 330 b. *Doe v. Moody*, 1 Sand. Uses, 41. 4th edit. *Doe v. Lynes*, 3 Barn. & Cres. 388. The case of *Doe v. Moody* is noticed by Mr. Preston, 2 Pres. Conv. xxxii, but the question of fraud, as there suggested, does not appear to have been noticed by the prior or later decisions. Mr. Sanders, in the page above cited, has favored the profession with a very able exposition of the doctrine alluded to, but neither his observations nor the case of *Doe v. Moody*, were noticed in the late case of *Doe v. Lynes*, in the King's Bench.

General rule,
and its use to
purchasers.

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These observations refer more immediately to direct attempts to bar the term by fine, feoffment, recovery, and non-claim. The term may also be barred without any specific intention in the *cestui que trust* to do so; as if at the time of levying the fine he be not aware of the attendant term, and its existence would endanger or affect his title. Then it seems from the 5th resolution, in the case of *Isham v. Morrice*, Cro. Car. 109, that a fine levied by the *cestui que trust* with five years non-claim, will operate as a bar to the trustee of the term, *et vide* what is said by Twisden and Ventris, Justices, in *Freeman v. Barnes*, 1 Vent. 82, and in *Dighton v. Greenvil*, 2 *ibid.* 329. From which cases this general rule may be deduced, that if the mortgagor or vendor of an estate, conceals from the purchaser or mortgagee the existence of an outstanding term, a fine levied to the use of the purchaser or mortgagee with five years non-claim, will bar the assignee of the term, and the trust will pass inclusively in the fine; but if the purchaser or mortgagee knows of an outstanding term, and it is agreed that the term shall be assigned in trust to secure the money lent or to attend the inheritance, in such case, though a fine be levied, it will operate on the inheritance only and not on the term, such being the plain intent of the parties. This doctrine is of considerable importance to purchasers, who may, by means of a fine, bar all outstanding terms of which they are not aware, and thereby effectually secure themselves from attacks by dormant incumbrancers obtaining assignments, by limited administrations or otherwise, of old terms for years long ago neglected and forgotten. See further, *Focus v. Salisbury*, Hard. 400, and *Corbett v. Stone*, Sir T. Raym. 140. 2 Pres. Conv. int. xxxii.

Merger.

2d. The term must not be merged. The head "Merger" embraces an infinite number and variety of particulars, which it is impossible to explain or

D. (a), in 1651, made B. a security out of the manor and

(a) *Bovey v. Shipwick*, 1 Ch. Ca. 201. 1 Eq. Ca. Abr. 321. 323, pl. 2.

even advert to in a note. Reference, therefore, is made to the immortal work of Mr. Preston on this subject, comprehending the whole of his third volume of conveyancing, reserving merely for observation in this place, a few of the leading and most useful rules on the doctrine; et vide 2 Tho. Co. Litt. 557, n. (K).

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It seems to be the better opinion, that one term may merge in another, when the two terms are immediately expectant on each other. *Hughes v. Robotham*, Cro. Eliz. 309. Poph. 31. Cham. Lea. 189. And as a remainder or reversion cannot merge in a prior particular estate, but the prior particular estate must, if any merger take place, be absorbed by the reversion or remainder; it follows, that the elder of the terms will merge in the term in remainder or reversion, though that term be for fewer years than the term in possession, and thus become extinct [*Stephens v. Bridges*, 6 Madd. 66; but Mr. Tamlyn (with dubious success) has attempted to prove that this case has not settled the question, Tam. Merg. 200]; whereby the protection afforded by that term would be lost, if both terms were assigned to one trustee. For this reason, as often as there are two terms in the same lands, and it is deemed advisable to keep both of them on foot, each term should be assigned to a distinct trustee. And when there are three or more terms, the first and third may be assigned to one trustee, and the second and fourth to another trustee. So where there are several terms in distinct parcels of land, the first and third terms in each distinct parcel, should be assigned to the same trustee, and the second and fourth terms should be assigned to the other trustee. It sometimes happens, that two or more terms immediately expectant on each other, have been already assigned to one trustee. Under these circumstances, the assignment should be made of all the terms to one trustee. The mischief, if any, arising from merger, has been already incurred, and no purpose would consequently be answered by an assignment to distinct trustees.

One term may
merge in an-
other, when.

The rule in the commentaries is, that where a term of years and the inheritance meet in one person in the same right, the term will become extinct, 2 Bl. Com. 117; and see *Cooke v. Cooke*, 2 Atk. 67, and *Wade v. Paget*, 1 Bro. C. C. 363. If therefore a termor purchase the inheritance, the term will be merged. But the rule holds only where the legal and equitable estates are co-extensive and commensurate, and not where the party has the whole legal estate and only a partial equitable interest. *Phillips v. Brydges*, 3 Ves. 126. A term which a person has as executor, administrator, or in right of his wife, will not merge in the freehold or inheritance which he had before the term became vested in him by such act of law. Nor will a term so held in another's right, be merged by a subsequent descent or devise of the reversion or remainder, 2 Pres. Abst. 12. But if A. be possessed of a term as executor, and then purchase the reversion in fee, this voluntary coalition of the estates will engender a merger, Shep. Touch. 497. Toller's Exors. 142. So generally a purchase of the reversion or remainder by a person having a term in another's right, will occasion a merger of the term, even though the purchaser be a

Other rules on
merger.

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rectory of W. and afterwards, in 1658, made S. a security for money out of the rectory only (S. having no notice *then* of B.'s

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trustee of the term. In *Denn v. Kemys*, 9 East, 372, it was made a question, (where an ancestor of the lessor of the plaintiff had acquired a tortious fee by disseisin in 1749,) whether the assignment of an outstanding mortgage term to such ancestor in 1770, by the executor of the mortgagee, did not merge the term in the fee, as the term and the fee could not, it was argued, exist together in the same person in their own right; for that in Co. Litt. 338 b, it was said, "that a man could not have a term for years in his own right, and a freehold *en auter droit* to consist together. [Sed quære this position, and see *Lichden v. Winsmore*, 2 Roll. Rep. 472, and *Polybank v. Hawkins*, 1 Doug. 329,] but he might have a freehold in his own right, and a term *en auter droit*; Or, whether a rightful term could merge in a wrongful fee; Or, whether such ancestor having a rightful and a wrongful title to the possession might not have elected to hold, and at the trial be presumed to have held, by her rightful title. It ultimately became unnecessary to decide these queries, and the case went off on other points.

*Term merged,
re-created by
assignment.*

But another question in this case of *Denn v. Kemys*, 9 East, 371, (which seems to have been conceded by the court,) was, whether an old term which was clearly merged, were not revived and assigned by a deed of 1728, noticing it as an existing term and conveying it as such from W.W. to Ann Anderson as a mortgage security; and whether the words "grant, bargain, sell, assign, and set over," though purporting to be an assignment of the old term, would not, if that term were merged, operate as a *new grant* or re-creation of the term by reference to the former for the residue of the years to come. And this Mr. Sugden lays down as settled law, in his Trea. on V. & P. p. 366, 5th edit. We must, however, distinguish this case of resuscitation from a mere confirmation, and remember that a term which has ceased and become void at law, cannot be set up and made good by confirmation, at least this is the law in respect to freehold interests; (Litt. s. 541. Co. Litt. 295, 6. Shep. Touch. 309, except perhaps as to the confirmation of the estate of a disseisee which may be held good, 1 Pres. Abst. 527), and there seems to be no reason in the case of leases for a different application of the first rule. To obtain the effect of a valid confirmation, there must be a new lease or words of grant and assignment introduced in the confirmation, sufficient to revive the term. In a case where it was attempted to make a term, created out of the equitable fee, a legal term by confirmation, it was the clear opinion of a conveyancer of the first eminence that it could not be done, the term being void at law. Instead, therefore, of assigning or demising for the residue of the said term, there ought in a case of this sort to be a demise and confirmation for a term, to be computed so as to make the legal estate correspond, as far as the circumstances will admit, with the equitable ownership. The student should also be apprised of the determination in *Wright v. Cartwright*, 1 Burr. 282, which has in a measure released cases of this kind from part of the difficulty in which they were formerly involved. That case admitted of a construction by which the word "term" might be taken as of the same import with the word "time;" and

*But not by con-
firmation.*

security, which was for money also), and S. hearing afterwards of B.'s security, bought in a mortgage made to D. secured upon

perhaps the courts, availing themselves of this rule of construction, might interpret the deed of confirmation, as a demise for the residue of the time intended to be limited by the deed creating the equitable term.

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It is further observable, that extinguishment of the term will ensue, though the term and reversion be limited by the same deed or will. Thus, if the limitation be to A. for years, with remainder to A. for life, the term will merge. But an intervening estate will always prevent the merger; for the party is not seised or possessed in possession of both estates at the same time. Consequently, if the limitation be to A. for years, with remainder to B. for life, with remainder to A. in fee, no merger will take place till the death of B. So, if a term of 300 years be created to-day, in A., 500 years to-morrow in B., and 1000 years the day after in C., and the terms of 300 and 1000 years ultimately meet in the same person, there will be no merger on account of the intervening term of 500 years in B.; *quod fuit concessum per cur. in Whitchurch v. Whitchurch*, 2 P. Wms. 236, vide etiam, *Scott v. Fenhoulet*, 1 Bro. C. C. 69, and Bro. Abr. (Extinguishment), 30. But though a term for years cannot subsist with an immediate remainder of freehold, yet the same person may be tenant for life with remainder for years, 3 Pres. Con. 44, 45. 1 Inst. 54 b.—As a corollary to the rule, that an intervening term or estate will prevent merger, it may be remarked, that if two terms are assigned to two distinct trustees, and afterwards it be wished to surrender the first term, it should be done by surrendering and merging the estate of the first trustee in that of the second, at least a surrender to the owner of the freehold will not be effectual, by reason of the intervening estate, until the determination of that estate, and a husbandry lease until its expiration, will be sufficient to prevent the operation of the surrender. Hence the necessity of using words of assignment in the surrender.

Intervening estate prevents merger.

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In *Hasket v. Strong*, at the Rolls, 2 Str. 689, Mr. How made a mortgage for 500 years, dated 9th June, 1720, to Neal. He then made a mortgage in fee to the plaintiff, and Neal assigned to the defendant, who afterwards advancing more money, took a conveyance of the inheritance, with an agreement that the term should be kept on foot as an additional security. The term was never assigned over to a third person. And on the question touching priority, it was argued, that if the term had been regularly kept on foot the defendant would have been in the common case of a third mortgagee taking in the first incumbrance to protect himself, by which he would have the law on his side, whereas here, the term was merged upon the grant of the inheritance, and, therefore, the law was with the plaintiff who had the first mortgage in fee. To which it was answered and decreed by the court, that the conveyance of the inheritance to the plaintiff interposing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant must be first paid his whole money.

Mortgage for years to A. mortgage in fee, to B., conveyance of equity of redemption to A. term not merged.

The term must not be extinguished by a proviso of ceaser. To the creation of most long terms, especially if raised by mortgage, marriage settlement, or

Proviso of ceaser,

both the manor and rectory, which was precedent to B.'s mort-

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*what it should
contain.*

*Power to por-
tion includes
power to create
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term, with
proviso of
cesser.*

annuity, a proviso of cesser is annexed, whereby the term is declared determinable on the happening of certain events. If those events do not happen, the term is generally considered as subsisting. But before a term to which a proviso of cesser has been originally annexed can be safely relied on, care should be taken to ascertain that the proviso has not operated; as, on the other hand, whenever it is alleged that the proviso of cesser has operated to defeat the estate, it should be seen that some or one of the events designated by the proviso of cesser have happened, and that the event alleged to have taken place falls within the scope and true construction of the words of the proviso. If a term be limited to trustees for raising portions for younger children, and it is declared that when the trusts are performed the term shall cease, if there are no younger children, there will not be any necessity for raising the portions, and consequently the trusts of the term cannot be performed: and it seems the term will not cease, the event provided for in the declaration of cesser not having happened. Hence care should be taken to introduce into the proviso every possible contingency; expressing—the events of the trusts never arising; their becoming unnecessary or incapable of taking effect; their performance, satisfaction, or discharge; and, fourthly, providing for the exoneration of so much of the estate as shall remain undisposed of after the purposes of the trust have been answered. And, it is observable, that *without* a proviso of cesser the term will, in every case, continue; as if a term be created for specific purposes, without more, those purposes being answered, or never arising, the term will nevertheless continue till expressly merged or surrendered.

In a case which occurred in practice, A. by his will gave B. a power to portion and to raise the same by creating any term, &c. such term to be redeemable by the person for the time being in possession of the estate. B., by his marriage settlement, directed portions to be raised, and created a term of 500 years, which he declared should cease as to such hereditaments as should not be wanted, or as to so much of the term as should remain undisposed of when the portion was raised. The question was, whether this proviso of cesser, after the portion had been raised out of premises in one county (C), annulled the term as to lands in another county (D), over which the term also rode? Which question, it will be perceived, turned on another, namely, whether B. had power to annex such a proviso of cesser as the one above-mentioned to the term? It was advised that the term ceased as to the lands in the county (D); for that a power to raise a sum on certain estates for portions would include a power to raise the same by mortgage. *Pow. on Mortg.* 72, 5th edit. If then a general power to portion would authorize the creation of a term, it certainly seemed to follow from the maxim, *magis continet in se minus*, that the person exercising that power had also authority to cease the term on any given event which he should think fit to name. But the case in question was much stronger: B. had a general power to raise portions; and he was also empowered by the same or by any other deed, *with or without revocation*, to limit and create any term for the purpose of securing such portions (such term to be redeemable by certain persons). He first created a term over the

gage; the principal question in the case was, whether, as the

whole property, and then, by the same deed, in pursuance of his power of revocation, revoked so much of that term as future circumstances might render useless. This revocation he effected by a proviso of cesser, which it was considered he was fully empowered to insert in his marriage settlement: and the operation of which had, it was conceived, ceased the term as to the hereditaments in the county (D). And reference was made to the case of *Evelyn v. Evelyn*, 2 P. Wms. 661. Pow. on Mortg. 92, 5th edit. n. (L), where lands in tail were by recovery conveyed to uses in strict settlement, with power for the tenants for life, when in possession, to make leases of the same for raising portions. The second tenant for life in possession demised the estates (with others) to trustees for a term of 500 years, in trust to raise portions, &c. *after the raising and paying of which, with costs, the term to cease.* This proviso of cesser was held good to cease the estate of the trustees in the term, after the portions were raised out of the rents and profits; the portions not being raiseable at once, but only by the leisurely means of receiving the rents and profits.

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When the events have happened on which a term is to cease, no artifice can keep the term on foot. The plan, therefore, of creating a fictitious mortgage so as to come within the terms only of the trusts, must be reprobated, for if the term should be set up in ejectment, it would be open to the adverse party to insist that the whole proceeding was fictitious, and consequently that the deeds of mortgage or other assurance, whereby it is endeavoured to continue the term, were negatory. But

Term directed to cease cannot be continued.

4th. The term must not be *presumed to have been surrendered*. The doctrine of presumed surrenders has recently occupied an intense share of professional attention. The deep interest which its consideration has excited, demands, in a work of this nature, that its principles should be thoroughly investigated, in order, if possible, to free it from the inconsistencies with which it has been charged. The doctrine is so essentially allied to the subject of this treatise, and an intimate acquaintance with its rules and elements, so useful to the practical conveyancer, that no apology will be requisite for the lengthened disquisition into which the writer proposes to run.

OF PRESUMED
SURRENDERS
OF TERMS FOR
YEARS.

Presumed surrenders depended, for the most part, till lately, on the practice of conveyancers; that practice appears, by old opinions in the Editor's possession, to have warranted these positions:—1st, If the term had been once assigned to attend the inheritance, it could never afterwards be presumed to have been surrendered, for a direct trust being annexed to the term, and that trust following the inheritance through all its channels, it was thought impossible to presume a surrender, in opposition to an express declaration, that the term should not be considered as merged, but that it should attend the inheritance. This was a general rule, to which, it will be seen, the third proposition after-mentioned formed an exception. It was, however, generally understood, that in all cases where a term had been once assigned to attend the inheritance, the term continued, and an assignment was usually recommended, if it could be obtained at a moderate expence, for that the purchaser or mortgagee might possibly derive some advantage from the right of contend-

Old rules of practice on presuming surrenders, now little varied.

defendant's security was only out of the rectory, and the security he bought in was of both the manor and rectory, he should

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ing that the term was subsisting; 2d, If the term had been long ago satisfied, had never been assigned to attend the inheritance, and had not been noticed for the last twenty years or upwards, then it was considered surrendered or barred by the statute of Limitations; 3d, If the term had been assigned to attend the inheritance, but had lain dormant for a long period of time, as, for instance, forty, fifty, or sixty years, and the title to the inheritance had, in the mean time, undergone several changes, and no notice had been taken of the term by way of exception, or in any other manner, it was considered fair and reasonable to draw that conclusion which it was thought a jury would certainly be directed to draw, that the term had been surrendered, or had been barred by the adverse possession of the respective purchasers under the statute of Limitations; but 4th, If the possession of the inheritance had been consistent with the trust of the term, it was considered that this *prima facie* rebutted the presumption of adverse possession, and that the possession of the *cestui que trust* would be evidence of title in the trustee, so as to enable him to maintain ejectment, notwithstanding twenty years or more may have elapsed since the last assignment of the term; and, therefore, 5th, If any notice had been taken of the term within a reasonable time, as if it had been excepted in covenants against incumbrances, or there had been a declaration that the trustee of the term should stand possessed thereof in trust to attend the inheritance, these, and similar circumstances, it was considered, afforded ground for treating the term as subsisting, and calling for an assignment of the term; so, 6th, If a term had been at a distant period of time assigned to attend the inheritance, and there had not been, in the mean time, any *substantial change in the ownership of the inheritance*, but the inheritance had remained continually in the same family, and had descended from the ancestor to the heir, or been the subject of family settlements, then, since the attendancy of the term was for the benefit of the title, and as no presumption against its continuance existed, it was thought highly probable that a jury would be directed to presume that the term was subsisting; at all events, it was said, it could not be relied on, that a jury would presume the surrender of the term in such a case on the score of adverse title, and therefore the prevailing practice was to call for an actual assignment of a term so circumstanced, in trust for the purposes required.

Questions
stated. Line
of inquiry pro-
posed.

Much time and controversy have of late been expended to point out the precise cases wherein old terms for years may be presumed to be surrendered, and where not. Mr. Sugden concludes his late celebrated Pamphlet on Presuming Surrenders of Terms, p. 35, 1st edit. in these words:—*It is now difficult to say in what case a term can be relied upon, for the presumption must have been made with reference to some period of time previously to the purchase. It would be dangerous, therefore, to rely on any term of years which has not, on every change of possession, been assigned to a new trustee, nor would it be safe to rely on such a term, if any of the owners have been in possession for a long period, although it is not, of course, in my power to draw*

make use of D.'s security as to the manor, after D.'s debt was satisfied by the profits of the manor and rectory; or,

the line. The decision [of *Doe v. Hilder*] has powerfully attracted the attention of the profession. Few men would now venture to say under what circumstances an attendant term will protect a purchaser against incumbrances of which he has not notice." This is throwing the doctrine into the utmost confusion; but this latter case, it is conceived, furnished no grounds for the warranty of such observations. The rule, it will be perceived, depends not so much on the period of time during which the term has lain dormant, as upon the circumstances from which that turpitude has arisen. The cases, it is submitted, do not render it difficult to say under what combination of circumstances a term shall or shall not be presumed to be surrendered, though, with reference to a period of time, they certainly do not even attempt to fix on any specific number of years, in imitation of the statute of Limitations, and to say that every term, so many years old, shall be presumed to be surrendered. Indeed, such a rule would exhibit a palpable absurdity, and annihilate entirely the whole doctrine of terms for years, longer than the period fixed on. The cases on this important and interesting subject we now propose to consider at some length. The investigation will exhibit a striking agreement between the adjudged cases and the above epitome of the ancient practice of conveyancers.

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The first case from which an inference on this subject is drawn, is that of *Willoughby v. Willoughby*, 1 T. R. 772. Ante, 471, where Lord Hardwicke admitted, "that if an old term has been assigned upon an *express* trust to attend the inheritance, as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have never been barred till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses; nay, where the assignment has been, generally, in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchaser, where the title-deeds always are, or ought to be taken in, for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him." It is inferred, that Lord Hardwicke here recognizes the doctrine laid down in the first section of the above epitome, that if the term be once assigned to attend the inheritance, it cannot afterwards be presumed to be surrendered, for that the foregoing remarks are incompatible with the opinion that the circumstance of so leaving terms outstanding in the old trustees, would let in the presumption of their being surrendered. It should, however, be observed, that the question before Lord Hardwicke was quite foreign to the point under consideration. His Lordship was comparing the effect of an actual assignment with a mere declaration of trust, and was of opinion that for every purpose of security, and with a considerably less expence, the mere declaration may be depended on with as much safety as an actual assignment. It is submitted, that Lord Hardwicke must be considered as referring to a declaration of trust by the trustee, or something tantamount to it, for he speaks of an approval of the old trustees, which, at least, implies a notice and recognition of the existence of the term

Inference from Lord Hardwicke's opinion, that declaration is equal to assignment, considered.

whether B. should not then be admitted to enjoy the manor, his security being as well of the manor as of the rectory, and

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All terms set up
by mortgagor
against mort-
gagee, pre-
sumed sur-
rendered.

in those trustees, if not notice of the intended change of ownership to the trustees themselves, which is widely different from completing the purchase and passing over the term in silence.

The next case is that of *Lade v. Holford*, Bull. N. P. 110. (S. C. on other points, 3 Burr. 1416, and 1 W. Bl. 428.) where Lord Mansfield declared, that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but to direct the jury to presume it surrendered. Here it is necessary to mark the introduction of a new principle, different from any we have yet noticed. Hitherto the ground of presumption has arisen from an apparent intention in the parties to abandon the term; an intention collected from their total neglect and disuse of the term and other circumstances. Here the ground of presumption is, that the party, though he has diligently preserved the term, and perhaps recently procured an assignment of it on fresh trusts to attend the inheritance, yet, since the purport of the term was to protect the owner from mesne incumbrances, it shall not be converted, by prior incumbrancers, to his disadvantage. The total annihilation of the term, however, assumes something of a violent, and, perhaps, mischievous cast; for abating the difficulty a jury, on oath, must necessarily feel in presuming a surrender against repeated assignments of the term, a lurking creditor of a former owner may take a husbandry lease, and so obtain possession, or, in league with the mortgagee, he may first procure a presumption of the surrender of the term, and then seize the estate, against which the term was decidedly intended to protect. But this *dictum* of Lord Mansfield is now considered as clear law, and has, in a series of cases, been uniformly acknowledged and acted on.

- Term in plain-
tiff's trustee not
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to be set up in
ejectment.

The same noble and learned Lord, in *Doe v. Pegge*, 1 T. R. 758, n. (a), observed, that an ejectment was a fictitious remedy to try the title to the possession of lands; it was of infinite consequence that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties had arisen as to the legal form of passing land, from the mode of conveyancing in England since the statute of uses. Trusts were a mode of conveyance peculiar to this country. In all other countries, the person entitled had the right and possession in himself. But in England, estates were vested in trustees, on whose death it became difficult to find out their representatives, and the owner could not get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found. Sir E. Northey's clerk was trustee of near half the great estates in the kingdom; on his death, it was not known who was his heir or representative. So that where a trust term was a mere matter of form, and the deeds were muniments of another's estate, it could not, his Lordship observed, be set up against the real owner. It was therefore settled, that a satisfied trust should be taken to be a trust for the benefit of the heir at law. A trust should never be set up against him for the trust was intended. It was a mere form of conveyance. And it was ad-

S. hold only the rectory till he was satisfied? And it was resolved and ruled by Finch, Lord Keeper, against the opinions

mitted, that where the term was in trust for the benefit of the lessor of the plaintiff, the defendant should not set it up in ejectment as a bar to his recovery. And his Lordship added, he found this point settled before he came into the court of K. B. that the court never suffered a mortgagor to set up the title of a third person against his mortgagee, for he made the mortgage; and it did not lie in his mouth to say otherwise, though such third person might have a right to recover possession. Nor should a tenant who had paid rent and acted as such, ever set up a superior title of a third person against his lessor in bar of an ejectment brought by him, for the tenant derived his title from him. Laying down these principles, Lord Mansfield would then apply them to the case before him. The case was this, the legal estate of the whole property was outstanding, some parts in a mortgagee for years, and other parts in trustees for a term of years to secure an annuity, subject to which it descended to two co-heirs of the intestate; one of whom obtained possession of the whole estate, and the other (or her representative) commenced an action of ejectment for a moiety. The defence was the want of legal title in the plaintiff, by reason of the term for years in the trustees. It was impossible to presume it surrendered, for the term was not a satisfied term. Then, said Lord Mansfield, if the trustees do not assert their title, shall others be permitted to set it up? The plaintiff admitted the charge, and claimed subject to it; and it was clear, that one co-heir should not be permitted to dispute the title of the other. The plaintiff and defendant had an equitable title as tenants in common, and the plaintiff must recover a moiety. Willis, J. concurred. Ashhurst, J. observed, that in such a case as this, a legal bar should never be set up in ejectment *against the justice of the case*. The trustees might perform their functions as well after both the parties were in possession. The old doctrine was relaxed in many instances. Buller, J. entirely agreed with Lord Mansfield, saying, it was clear law, that a tenant could not set up the title of the mortgagee against the mortgagor because he held under the mortgagor, and had admitted his title. It was not therefore, true that an outstanding unsatisfied term was always an answer to a plaintiff in ejectment. So long ago as the time of Justice Gundry, when an outstanding satisfied term was offered by a defendant in ejectment as a bar to the plaintiff's recovery, that Judge refused to admit it, saying that there was no use in taking an outstanding term, but for the sake of the conveyancer's pocket: since which time it had been the uniform doctrine, that if the plaintiff be entitled to the beneficial interest, he shall recover the possession. The annuitant was only entitled to her 200*l. per annum*, and not to the possession itself whilst there was no default: indeed, she did not require it. But the heir at law was entitled to the possession, subject to that charge. The annuitant, however, was in a different situation from the mortgagee, for the latter was entitled to receive the whole in diminution of the principal and interest. Judgment therefore was given for the plaintiff.

The book recording the opinion of Mr. Justice Gundry, is not cited by Mr. Justice Buller; but Lord Hardwicke, in the firstly quoted case of *Wil-*

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Mortgagor not to set up title against mortgagee.

Recovery on equitable title allowed. [Contra nunc.]

Tenant not to set up title of mortgagee against mortgagor.

Doe v. Pegge over-ruled as to

of Wild and Twisden, Justices, that S. should hold both the

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*recovery in
ejectment on
equitable title.*

loughby v. Willoughby, appears to have entertained a similar opinion, obtained, perhaps, from the same source; and Lord Kenyon, in a case we shall presently mention, alluded to the same doctrine as held by Mr. Justice Gundry, at Hereford. So much of this case of *Doe v. Pegge*, as supports the position that an unsatisfied term cannot be set up against the equitable owner in ejectment, was rejected by Lord Kenyon, in *Doe v. Staple*, ubi infra, who held, that though a satisfied term might be presumed to have been surrendered, yet that an *unsatisfied* term, raised for the purpose of securing an annuity, might be set up during the life of the annuitant as a bar to a plaintiff in ejectment, even though he claim subject to the charge; and such is now considered to be the doctrine of the court, see ante, 173, note (B). But the case, it is observable, supports the rules, that a surrender shall not be presumed against the real owner of the inheritance.

*Though mort-
gagor may not
set up term
against mort-
gagee, his as-
signee may.*

In *Goodtitle v. Morgan*, 1 T. R. 755, a mortgage for 999 years was made in 1761, by one Jones, owner of the fee, to Margaret Ambrose; in 1767, Jones made a mortgage in fee to Morgan; and in July, 1769, he made another mortgage in fee to Richard David. In 1768, the 999 years term was assigned to a trustee for Jones, and to attend the inheritance: the first mortgage in fee being, consequently, before that assignment, and the last after it. In December, 1769, Jones made another mortgage in fee to Sprigg, and the term of 999 years was assigned to a trustee for Sprigg; and the question was, whether he could recover in ejectment on the demise of his trustee against the two prior mortgages in fee? It was argued, that if previously to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set up this term as a bar to their ejectment; and that if Jones himself could not set up the term, it seemed absurd to say, that those who claimed under him could; for they could not claim a greater estate than he had. The fallacy of this argument may be easily seen. The reason why the mortgagor could not be allowed to set up the term against his own grantee, was not because the term would be presumed to be surrendered, or because it was otherwise inefficient for the purpose intended, but because it did not lie with him to vacate his own grant, which reason on the lips of a third person, who perchance might claim under him, would not apply. The argument did not prevail. The question was consequently determined in the affirmative, and the postea awarded to the plaintiff.

*No presump-
tion of surren-
der from mort-
gagee's neglect-
ing to take as-
signment of
term.*

It is said the principle deducible from this case is, that it decides clearly, that a surrender of the term cannot be presumed, on the ground that the first mortgagee did not take an assignment or a declaration of trust of it. But there is a considerable difference between a mortgage and sale in reference to any presumption which might arise from the circumstance of the term being passed over in silence on a change of property.

*Term recited in
special verdict,
cannot be pre-
sumed surren-
dered.*

Lord Kenyon, in *Doe v. Staple*, 2 T. R. 696, approved extremely of what was said by Lord Mansfield, in the case of *Lade v. Holford*, ubi supra, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a

manor and rectory against B., until all due on both the securities was paid him.

mortgagee, but would direct a jury to presume a surrender. Lord Kenyon much approved of that, and added, that when a surrender was presumed, there was an end of the legal title created by the term. But in the case before him, the facts precluded any such presumption, there was an existing term at the several times of the two first demises laid in the declaration, and a considerable benefit was to be derived out of it: the last annuitant did not die till after the time of the second demise, therefore there was no reason to presume that the trustees had surrendered, and they would have been personally liable if they had; and, subsequently, it seemed impossible to suppose that there was a surrender of the term, or that it was satisfied because the special verdict expressly found the contrary fact.

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No notice is taken of the case of *England v. Slade*, 4 T. R. 682, in the above-mentioned pamphlet on Presuming Surrenders of Terms, although it bears considerably on the point there discussed; especially as to the period in which a surrender may be presumed. The objection to an ejectment in that case was, that no conveyance of the legal estate from the persons who were devisees in trust for the testator's son, immediately on his attaining twenty-one, was proved. To this it was answered, that it was the case of a plain trust, and that a conveyance should be presumed. But Gould, J. at the trial, thought the objection valid, and that there was not length of time sufficient to raise such a presumption [four years only having elapsed since the son came of age.] The plaintiff was therefore nonsuited, but he had leave to move to set aside the nonsuit and enter a verdict for him, if the court should be of a different opinion; the court in Banco were of a different opinion—Lord Kenyon observing, that he did not know that the son had not the legal estate in him. There was no reason why the jury should not have presumed a conveyance from the trustees to the son upon his attaining the age of twenty-one in pursuance of their trust, according to what was said by Lord Mansfield, in *Lade v. Holford*. It was what they were bound to do, and what a court of equity would have compelled them to have done if they had refused. But it was rather to be presumed that they had done their duty. And as to the time, the jury might be directed to presume a surrender or conveyance in a much less time than twenty years. And, thereupon a rule nisi, which had been obtained on a former day, was made absolute.

Estate to be conveyed to son on his coming of age, conveyance of legal estate presumed after four years.
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The case of *Doe v. Sybourn*, 7 T. R. 2, was similarly circumstanced. At the trial, the defendant set up a lease from J. Pym, executed after he came of age, whereby he demised the premises to the defendant for eighty-one years. Against this, it was objected, that it did not appear that J. Pym had the legal estate in him at the time, but that it was outstanding in his trustee, without whose concurrence no legal title could be conveyed. Lord Kenyon thought that the jury might presume a legal conveyance from the trustees to J. Pym upon his coming of age, pursuant to the terms of the trust, upon which the plaintiff submitted to a nonsuit. Upon a motion to set aside the nonsuit, his Lordship further observed, that as to the presumption which he

Where trustees ought to convey, jury may presume conveyance.

Same where prior statute covered subsequent mortgage and other estates.

So where B. seised in fee, acknowledged a statute of 1000*l.* to I. S. in 1663 (o), and on the 20th of June, 1665, mortgaged

(o) *Wyndham v. Richardson*, 2 Ch. Ca. 219. *Supra*, 448, 9, 50, 1.

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had directed the jury to make, he had grounded himself upon the doctrine laid down by Lord Mansfield, in *Lade v. Holford*, which was not, as had been supposed, that an ejectment might be maintained upon a mere equitable title, which would remove ancient land-marks in the law, and create great confusion; but, that in all cases, where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form. And this had not only been so held by Lord Mansfield, but before his time by Mr. Justice Gundry, at Hereford. And Lord Kenyon thought this rule, as far as it went, highly convenient and proper. The court therefore refused a rule to shew cause why the nonsuit should not be set aside.

Term not noticed for sixty years, no sale in mean time, yet term presumed surrendered. *Semb.*

The next case is that of *Goodtitle ex dem. Owen Jones v. Evan Jones*, in error, 7 T. R. 43, which tends obliquely to establish that position, that where a term has been once assigned to attend the inheritance, and then not noticed for sixty years, except by a mere declaration in a mortgage deed to which the trustee is not a party, there the term may be presumed to have been surrendered, even though the property may have undergone no changes but family descents and devolutions in the mean time. The circumstances of this case are these:—In 1690, a term of 500 years was created, and in 1713, satisfied and assigned to one Lloyd, in trust for E. Griffiths, the then owner of the property, and to attend the inheritance. Griffiths devised the estate to Jones, who, in 1749, made his will, and gave the estate to Owen Jones his eldest son for life, with remainder to his children in tail, with remainder to John Jones his second son for life, with remainder to his children in tail, with remainders over. In December, 1780, [67 years after the last and only assignment of the term], Owen Jones, by lease and release, mortgaged the premises to one J. D. in fee, for securing 400*l.* In the release it was declared, that the residue of the term of 500 years created in June, 1690, and all other terms (if any such there were), should remain vested in the several persons, who were then possessed of the same, in trust for J. D., his heirs, executors, &c. for securing the 400*l.*, and after payment thereof in trust for Owen Jones and his heirs, and to be disposed of as he should direct, and in default thereof to wait upon the inheritance. In January, 1782, Owen Jones and the representatives of J. D. the mortgagee (who was then dead), by lease and release, conveyed the premises in question to W. J. in fee, for valuable consideration, out of which the mortgage money was paid. W. J. died, leaving the defendant his heir at law in possession of the premises. Owen Jones died without issue, whereupon Owen Jones the lessor of the plaintiff, and the eldest son of John Jones being the next in remainder, commenced his action of ejectment. These facts were stated in a special verdict found at the trial below. But it did not appear, that the outstanding term created in 1690, had ever been assigned by J. Lloyd or his representatives, before the ejectment

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Term acquired in after ejectment brought.

the manor of A. to the plaintiffs W. and K. for 2000 $\frac{1}{2}$ and,

was brought. It was stated in the verdict, that on the 25th July, 1793, after the ejectment was commenced, administration of the effects of J. Lloyd un- administered to by G. Lloyd, was granted to Griffith Thomas, who on the 27th July, 1793, assigned the said term to one J. Griffiths, in trust for Evan Jones the defendant. On this special verdict, judgment below was given for the lessor of the plaintiff; to reverse which a writ of error was now brought in B. R.—Lord Kenyon, Ch. J. observed, that on this special verdict, the question between the two litigating parties was not open to discussion, for that it was stated in the verdict, that an old term which was created in the last century, had been from time to time assigned, and was noticed as a subsisting term so lately as the year 1780, in the mortgage by Owen Jones to J. D. That as long as that was in existence, it was an answer to an ejectment brought by any other person. That though, under certain circumstances, a judge might direct a jury to presume an outstanding satisfied term to have been surrendered by the trustee, yet if no such presumption were made, but it was stated as a fact, that the term still continued, such a legal estate in the trustee must prevail in a court of law. That what was said by Lord Mansfield in *Lade v. Holford* must be understood with this restriction, that in either case the jury might presume the term surrendered; but that without such surrender the estate in the trustee must prevail at law, and that to the proposition so qualified Lord Kenyon fully assented. Ashhurst, J. concurred. Grose, J. observed, “Here is a legal term of 500 years vested in the person claiming under J. Lloyd, and he not having joined in the ejectment, the plaintiff cannot recover. In some cases the jury may presume the surrender of a satisfied term, and that gets rid of the difficulty which exists in this case; but here it appears on the verdict, that the term is an outstanding term.” And per Lawrence, J. the administration *de bonis non* of J. Lloyd was not obtained until after the ejectment was brought, and therefore the plaintiff could not have laid a demise by the trustee. If the jury, however, at the trial had presumed that this term had been surrendered to J. Jones, the devisee of E. Griffiths, the administration *de bonis non* of J. Lloyd would have been out of the way. But as the ejectment was brought by a person who, it appeared by the special verdict, had not the legal title, he could not recover in a court of law.

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Presumption not made at trial in country cannot be made afterwards;

if term appear outstanding in special verdict.

Lord Kenyon's opinion in favor of a presumed surrender continued the same to the last decision he pronounced on this subject. In *Roe v. Read*, 8 T. R. 118, he said, the opinion he had several times given while he sat in that court remained unshaken. He agreed with what was said in *Lade v. Holford*, that where the beneficial occupation of an estate by the possessor has given reason to suppose, that possibly there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate; but if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law; and in this respect, Lord Kenyon could not distinguish between the

General rule.

two days afterwards, mortgaged part of the same to the de-

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Lord Eldon's
disapproval of
doctrine.

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case of an ejectment brought by a trustee against his *cestui que trust*, and an ejectment brought by any other person.

Hitherto we have been considering the bearing of the question in courts of law; we now turn to the equity *dicta* and decisions. The first case acquaints us with Lord Eldon's opinion on this subject, and of his dissatisfaction with the encroachment (if it may be so termed) which courts of law have made on his jurisdiction, by entertaining the opinions they have uniformly held in the preceding cases. In *Evans v. Bicknell*, 6 Ves. 174, his Lordship observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to distinctions which perhaps would be found in the very principles upon which the Court of Chancery existed. Titles to property might possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench, as to satisfied terms. The law as to *that* in equity was, that a second mortgagee having no notice of the first mortgage, if he could get in a satisfied term, would do that which was the true ground of the decision, though it was not put upon that by Mr. Justice Buller: he [the mortgagee] would, as in conscience he might, get the legal estate, and by virtue of that protect his estate against the first mortgagee, having got a prior title, the conscience being equal between the parties. When once it was said at law, that a satisfied term should not be set up in ejectment, the whole security of that title was destroyed, and therefore, even with the modern correction that doctrine had received in the late cases (namely, that you might set up the term, though satisfied, and put it as a question to the jury, whether an assignment was to be presumed), it seemed to Lord Eldon very dangerous between purchasers; and the leaning of the Court [of King's Bench] ought to be, that it was not assigned; and Lord Eldon fully concurred with Lord Kenyon, that it was not fit for a judge to tell a jury they are to presume a term assigned [read surrendered] because it is satisfied; but there ought to be some dealing upon it; or, said Lord Eldon, you took from a purchaser the effect of his diligence in having got in the legal estate, to the benefit of which he was entitled.—It does not appear that Lord Kenyon ever said, in so many words, that there ought to be some dealing on the term to keep it alive; but it may, perhaps, be inferred, from the circumstances of some of the cases, and his Lordship's judgments thereon, that such was his opinion. By this *dictum* of Lord Eldon, we mark no actual variation in the doctrine, which, though not entirely approved by him, still continues a creature of law, and has never yet been decidedly acted on in a court of equity.

Doubts whether
assignment be
necessary on
every change of
ownership.

The same noble Lord (Eldon) in a subsequent case said, that with great deference to the authority of Lord Hardwicke, and of the Master of the Rolls, in the cause before him, he doubted whether it was possible, upon principle, to say that the assignment of a term which has been once assigned to attend the inheritance, is necessary from time to time, whenever that inheritance is made the subject of purchase. If it were true, that the law of the court was decided to be such at the time by Lord Hardwicke, and had been

fendant B. and then died, leaving the defendant H. his heir;

since understood to be so, that must prevail. But it was necessary to be perfectly satisfied that Lord Hardwicke did consider the law as settled in that case, and that it had been since so understood. *Maundrell v. Maundrell*, 10 Ves. 259. Lord Hardwicke certainly did not mean to say that an actual assignment was, on every change of property, necessary to confer protection on the new taker; but, it is submitted, that he intended to be understood as intimating an opinion that an actual assignment, a declaration by the trustee, or something tantamount thereto, was absolutely requisite to prevent the presumption that the parties intended to abandon their trust and equity in the term and to treat it thereafter as actually surrendered. In the pamphlet before alluded to, the above-mentioned doubt of Lord Eldon is considered as a "grave authority for the continued existence of the term, though it be left in the name of the original trustee." If, leaving the term in the original trustee without taking a declaration from him, is here intended, as it is presumed it is, neither Lord Hardwicke nor Lord Eldon, it is submitted, ever meant to be understood as saying that such quiescent leaving of the term should not, in time, raise a presumption that it was surrendered. It can hardly be imagined that these noble Lords, after explaining the paramount importance of obtaining the legal estate by means of an actual assignment of the term, both as it respects protection against dower, and against other legal incumbrances, should, in the same breath, cut down all their previous observations, and say that a purchaser or mortgagee may safely dispense with the trouble and expence of taking an assignment of the term, and rely on its protection, notwithstanding he may have permitted it to remain in the old trustee, and at the time of his purchase passed it over in silence, and have taken no other notice whatever of it since.

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It is also observable, that the observations of Lord Eldon in *Maundrell v. Maundrell*, were made without any reference to the above cited cases at law, and consequently, as it is submitted, without any intention of considering, how passing over the term in silence, and taking neither declaration nor assignment or other document respecting it, would affect the existence of the term under the ordinary rules of the common law doctrine of presumed surrenders. The learned author of the same pamphlet further observes, that "the opinion of the Lord Chancellor in *Maundrell v. Maundrell*, therefore is, that an assignment of the term is not necessary upon every new purchase," and that "this is a powerful authority against the presumption of a surrender, on the same ground that the term has been left undisturbed." The authority of a *dubious dictum* (for observe, there is no decision on the subject in equity) must, at all times, be very weak, and in the teeth of that abundant and unimpeached series of decision which the above-mentioned cases exhibit, it must certainly yield all claims to *power* and *gravity*; and if Lord Eldon's observations can be construed to denote any difference of opinion against the presumption of a surrender, on the mere ground that the term has been left undisturbed, (to do which they must, it is conceived, undergo some violation, especially in reference to the context,) the cases at law shew plainly that such a permission of the term to remain in the old trustee, (the purchaser

*Inference from
Maundrell v.
Maundrell con-
sidered.*

and to pay M. the debt due on the statute, after such time as the statute should be extended, and an assignment made

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*Term kept alive
by recital of its
existence in*

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*deed to which
trustee is a
party.*

it should, it is submitted, be inquired, is there any purpose of justice to answer by annihilating or continuing the term?

In *Doe v. Scott*, ubi supra, an old outstanding term was set up in ejectment against the plaintiff's recovery. It appeared that the term had been created in 1727, and had been several times assigned for securing different sums of money, but never to attend the inheritance. In 1751 it was declared in a settlement made on the marriage of Lord O. the then owner of the inheritance, that part of his wife's fortune was appropriated towards paying off the monies due to the mortgagee who held this term as his security. Since then, no mention had been made of the term, nor was there any other evidence of its existence, till, in a mortgage deed dated 3d December, 1802, to which the owner of the inheritance, and the representatives of the termor, were parties, (the deed reciting that the term was subsisting,) the term was thereby assigned to other persons to secure the mortgage-money to Lord O. which he had paid off with his wife's fortune. On the part of the plaintiff, it was contended, that as the deed of 1751 stated an adequate sum to have been applied in discharging the mortgage then existing on the property, and there being no evidence that the term was recognised or acted on from that period till 1802, (the owner of the inheritance having in the mean time the possession of the deeds respecting it,) the presumption was, that the term had been surrendered previously to the last assignment of it; for if before 1802, an ejectment had been brought on the demise of Lord O. against any intruder on his property, this term could never have been set up in bar of his possessory title, but any Judge would have directed the jury to presume a surrender of the term as long before satisfied. Lord Ellenborough, C. J. asked whether the learned Judge who tried the cause in the country, had been desired to leave that presumption to the jury? and being answered, that Mr. Baron Thompson, (the Judge before whom the cause was heard,) was of opinion at the time, that there was no ground whatever for making such a presumption against the owner of the inheritance, but that he had afterwards expressed a doubt of that opinion: Lord Ellenborough continued, "There is no purpose of justice to be answered by presuming a surrender in this case, nor is it for the interest of the owner of the inheritance to have such a presumption made." It might have been his intention to keep alive the term, and to have it assigned to a trustee to attend the inheritance." On the next day Bayley, J. said, that he had seen Mr. Baron Thompson, who had mentioned to him, that though he had, after the trial, intimated a wish to have the case moved in court, yet, having since had it under his consideration, he no longer had any doubt upon it: for that though no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, Mr. Baron Thompson thought that was sufficient to warrant him in the opinion which he had delivered at the trial. Lord Ellenborough, C. J. then said, that as the Judge who tried the cause was satisfied, and the court had no doubt on the subject, there was no necessity

thereof by M. to B. The statute was extended in August, 1672. The plaintiff's bill was, that on paying the debt on the

for any further discussion of the matter, and refused the rule for a new trial.

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We now turn to the two recent and important cases of *Doe v. Wright*, and *Doe v. Hilder*, the latter of which has given so much dissatisfaction to the conveyancer. In *Doe v. Wright*, 2 Barn. & Ald. 710, the defendant, on the decease of the former owner of the property in question, entered into possession of the premises as heir at law, but it was clearly proved at the trial that the lessor of the plaintiff was the true heir at law of the ancestor, who died seised of the estate. The defendant then set up a term of one thousand years, which was created in 1717, and in 1735 assigned for the purpose of securing an annuity to A. and after that, to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been, in the mean time, taken of the term, except that in 1801, the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for, the learned Judge (Park), at the trial, directed the jury to presume a surrender of the term, stating, first, that the great object of the assignment of the term was to secure an annuity of 45*l.* to two persons who were long ago dead; and that part of the trust was satisfied; and secondly, that as to attending the inheritance, which was another object, *the circumstance that the deeds were not found in the hands of the trustees*, but in those of the owner of the inheritance (Mrs. Oglethorpe), who had been seised in fee of the estate and had died upwards of thirty years ago, at the age of seventy-nine, and from whom the devisees must have derived possession of them, together with the fact that the beneficial occupation of the estate had continued during all that period unfettered by any such clog, were sufficient to warrant them in presuming, that the term had been surrendered and a re-conveyance of the legal estate made to the person beneficially interested. The jury accordingly found a verdict for the plaintiff. A rule nisi for a new trial having been obtained on a former day, the learned Author of the above-mentioned pamphlet, of counsel for the defendant, argued in support of the rule, that in answer to the presumption, there was the fact of the term being created in 1717, and dealt with in 1727, of the assignment of 1735, and the deed of G. Sharpe alluding to it in 1801, and therefore that the learned Judge was not warranted in his direction to the jury on this point. Mr. Justice Bayley, however, in delivering the unanimous opinion of the court, thought, that if the learned Judge at the trial, had used the strongest terms of recommendation and advice to the jury, he would have been right. The annuitant died in 1741; and Mr. Justice Bayley could not see any sufficient reason for continuing the terms from that period, for, from the time of the death of the annuitant, the object ceased, and, in point of fact, from 1741 till the present time with one exception only, nothing had even been heard of the term.

Covenant to produce deed creating term, not enough to keep term alive.

[502]

The principle upon which the courts proceed in these cases, continued the learned Judge, was, that they would presume a surrender where it was for

Surrender presumed, only where it is for

statute, it might be set aside and assigned to them, and for

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*interest of
owner of in-
heritance.*

the interest of the owner of the inheritance that the term should be considered as surrendered, and where an estate had continued for so long a period in the same hands, there seemed no beneficial purpose which could be answered by the continuance of the term. If, for instance, in 1786, [the date of the will of Mrs. Oglethorpe, the then owner of the inheritance,] this term had been considered as subsisting, it would have been necessary for Mrs. Oglethorpe to have made inquiry, and to have found out the personal representative of the trustee after a lapse of fifty-one years, and, perhaps, at the expence of a limited administration. The learned Judge, therefore, could see no benefit, but, on the contrary, a great inconvenience to the owner of the inheritance, from keeping the term alive. It was true, that in 1807, G. Sharpe covenanted for the production of the deed of 1735; he did not, however, assign the term, but only said, "I find this deed in my possession, and I covenant to produce it." H. Sharpe treated the term, therefore, as subsisting in parchment, but said nothing as to whether it was then subsisting in interest, or not. The case of *Doe v. Scott* was very different from this; there the term had been dealt with as subsisting, and it would, besides, have been prejudicial to the owner of the inheritance if a surrender had been presumed. Mr. Justice Bayley therefore thought, that the learned Judge (Park) was quite right in his directions to the jury on this point.

*Term presumed
surrendered
against owner.*

At length it became necessary to decide, that a term, under certain circumstances, might be presumed to be surrendered *against* a purchaser or mortgagee, as before it was settled, that such a presumption might be made in his favor only. This was adjudged on solemn argument and deliberation by the court of King's Bench in *Doe v. Hilder*, 2 Barn. & Ald. 787. (1819.) The judgment of the court in that agitated case, as delivered by Lord Chief Justice Abbott, contains a statement of the facts, and, if it be a case not exactly satisfactory to an equity lawyer, it is, at least, consistent with, and built upon the previous decisions of the court, wherein it was determined, and it must be acknowledged, that it comprises many cogent reasons in equity and justice to support it. The importance of the case, and the very opposite remarks of the learned Judge, will form the best excuse (if any be wanting) for the detailed extract which it is considered requisite to insert here. The court, after taking time to consider, pronounced judgment as follows :—

*Judgment of
Court in Doe
v. Hilder.*

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" This was an action of ejectment tried before my Brother Park, at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman for 8000*l.*, and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved, that the defendant occupied the land as a tenant, and had declared that he considered it to belong to Richard Newman, and had delivered to him a notice of the judgment received in June 1818 from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23d June, 1762, F. H. Naylor had conveyed the premises in question *inter alia*

a decree against H. to pay or be foreclosed of redemption.

to T. Carter, for a term of 1000 years, by way of mortgage, for securing the sum of 6000*l*. That in the year 1779 the mortgage was paid off, and deeds were then executed, whereby in effect the term was assigned to W. Denman, in trust for J. Newman (a purchaser of the premises), and to attend the inheritance. That in the month of October, 1814, the said R. Newman, to whom the premises had descended from the purchaser J. Newman, made a settlement on his intended marriage, whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee. That in the year 1816 the said R. Newman and his wife conveyed their life estates and his reversion in fee to Sarah Newman the mother of Richard, as a security for 116*z*l., which appears to have been money due from him to her. That Mrs. Newman the mother died in the year 1817, having previously devised her interest to some other relations [under whom the defendant claimed as tenant]. That W. Denman to whom the term had been assigned, in trust to attend the inheritance as aforesaid, died about four years ago, and that on the 19th March last [after the commencement of the ejectment] his son took out administration to him, and executed a deed purporting to be an assignment of the term, to a person therein named, in trust for a devisee of Mrs. Newman, the mother. Upon this evidence two questions were made at the trial; whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then whether it was a trust within the 10th section of the statute of frauds, so as not to stand in the way of the execution on the judgment." [As to this, see post, vol. ii. Chap. XIV.] Upon this latter point, however, it was not necessary for the learned Judges to pronounce any judgment, because they were of opinion that a surrender of the term might lawfully and reasonably be presumed.

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"It is obvious," continued the Lord Chief Justice, "that if such a surrender had been made, it would probably not be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being, as it was said, all cases of presumption in favor of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee; and this is said generally and without distinction between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favor of the owner of the inheritance. It is made against his interest at the time of the trial, but in favor of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power, as an instrument to defeat his mortgage. And upon the same principle on which a surrender is presumed in the case of mortgagor and mort-

Presumption made against mortgagor in favor of his honesty.

One question was, whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the

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Grant presumed of right of way, from long usage. [S. L. 3 B. & C. 621. 3 Bing. 115.]
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Long possession by cestui que trust not in itself a ground for surrender.

Neglect of term evidence of its surrender.

Necessity of noticing terms on marriage settlements;

gagee, it might reasonably be presumed in the present case, though the principle is applicable not to the judgment creditor but to other persons.

“ One of the general grounds of a presumption is, the existence of a state of things which may most reasonably be accounted for, by supposing the matter presumed. Thus, the long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and, in the latter, a release of it is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term: and therefore in general such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made in such cases, the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and therefore a surrender may be presumed.

“ We think,” continued Lord C. J. Abbott, “ there are such things in the present case. In the year 1814, Richard Newman the debtor, and then owner of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion the title and title-deeds of the husband would probably be looked into by professional men, on the part of the husband at least, if not on part of the wife also; and notwithstanding the assertion of one of the learned gentlemen [Mr. Sugden], who argued this case on the part of the defendant, and by whom we were informed that it is not usual, on such occasions, to take any notice of an outstanding satisfied term, we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because if it be not noticed, and the termor be not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument of defeating the settlement. The title-deeds usually remain with the husband; and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and may, by handing over his deeds, and obtaining an assignment of the term to him, and other conveyances, give to him a title that must prevail both at law, and in courts of equity, against

statute without paying off the 2000*l.* due on the second mortgage to B. until the statute was satisfied, not according to

the settlement. The supposed practice of taking no notice of outstanding terms on such an occasion appears to have been insisted upon before Lord Hardwicke, in the case of *Willoughby v. Willoughby*, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule. If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement, as one of the securities of the settlement, *the case would have stood on a very different ground.*

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“The marriage settlement, however, is not the only question on which we think it may most reasonably be supposed, that this term, if existing, would have been brought forward. It appears, that in 1816, the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interests they derived under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favor of the mortgagee, because they would have protected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded, without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions; and it is more reasonable to presume a prior surrender of the term, than to *presume such deficiencies.* It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions; and this was done at the trial. It is true that an assignment of the term was taken a few days before the trial for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf the present case was defended. But this tardy act cannot be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested; and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term, on behalf of the mortgagee, was the date of the mortgage.

and mortgages,
if meant to be
continued.

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Assignment
pendente lite
no avail to re-
but presump-
tion.

“An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of *Maundrell v. Maundrell*, 7 Ves. 576, and 10 *ibid.* 246, and the cases there cited. These observations respecting the settlement and the mortgage, receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from the judgment, and excluding all questions on the subject of priority or otherwise in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her; and in the case of the mortgage, for the sake of the mortgagee, to whom he was so nearly related, and who was evidently a favored

Assignment of
term more re-
garded than its
quiescent exist-
ence.

the justice of the debt in equity, but according to the ex-

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creditor. *And it cannot be denied that an actual assignment of the term would have been in many respects more operative against the judgment than its mere existence.* In the case of the mortgage, it would have put an end to all question on the statute of frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of *Hunt v. Cole*, 1 Com. Rep. 226." For these reasons the learned Judges of the Court of King's Bench thought that the verdict ought not to be disturbed, and that the rule must be discharged; and it was discharged accordingly.

**Corollary to
*Doe v. Hilder.***

Thus, notwithstanding the rule that courts of law cannot take cognizance of trusts (*per* Lord Kenyon, 7 T. R. 46), trusts of attendant terms must now be considered as forming an exception to that rule. In most of the instances cited, the courts of law have evinced a disposition to depart from their rigid rule of considering every term to be a term in gross. They look into the intent and meaning of the parties; take notice of the *cestui que trust*; and examine the circumstances in reference to the consistency of his estate with the declared object of the original deed. It may indeed be thought that courts of law do not in these instances *adjudicate* upon trusts, but merely take notice of them for the purpose of ascertaining the true rights and liabilities of the parties; in short, that they look at the trusts as mere facts, by a knowledge of which they are enabled to administer more complete and substantial justice. Mr. Justice Burrough has said, that sitting in the Court of Common Pleas he "knows nothing of equity and good conscience." The question is, whether, in noticing the trusts of attendant terms, and delivering a judgment on them different from what he would pronounce if he had no knowledge of those trusts, he does not in a degree transgress this principle of justice which he has prescribed himself? To shelter himself under the above suggestion is a high refinement, and it is to be remembered that courts of law not only acknowledge these trusts when they are stated by the parties, but will themselves determine when and under what circumstances the term became attendant, which it must be admitted is a greater encroachment on the equitable jurisdiction than simply allowing a case of the legal estate to be affected with a knowledge of an acknowledged trust.

Term not assigned on last purchase presumed surrendered, notwithstanding declaration that all terms should attend.

In *Bartlett v. Downes*, 3 Barn. & Cress. 616, a still stronger disposition has been evinced to presume the surrender of a term where any slight circumstance can be laid hold of to induce that conclusion. The facts of this case were briefly these:—

A term of 500 years was created in 1712. On a sale of the manor, &c. in 1785, it was assigned to attend the inheritance. In 1793, the manor and lands comprised in the term were purchased by Robert Ray. The conveyance to him contained a general declaration, that all persons having any terms in them, should hold them in trust to attend the inheritance, but no particular term was specified.

It does not appear on the case, how the estate passed from Robert Ray to Rose his wife, but in 1821, she being then the admitted owner, appointed the plaintiff steward of her manor for the term of his life; and the question arose on the validity of that appointment. She died shortly after, having by a will, dated since the said appointment, devised the manor, &c. to Downes

tended value? It was objected that the defendant B. had

in fee; Downes appears to have appointed his brother, the defendant, steward of the said manor, who held a court and received the fees, but there was not any evidence adduced of this latter appointment. For these fees of court the plaintiff, as steward for the term of life under the prior appointment, brought the present action for money had and received, against which the said term was set up as a defence. The only evidence read at the trial, besides that relating to the term, was a letter written by Downes the devisee, in which he admitted the testatrix's right to appoint a steward, but questioned the fact of her having done so.

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Abbott, C. J. in delivering the opinion of the court observed, that if the outstanding term which the defendant set up could prevail, it would prevail to defeat the act of the testatrix in making the grant she made. The general principle upon which a presumption should be allowed his Lordship thought was this, that that which has been done should be presumed to be rightly done. The same principle was to be applied to presumptions in the case of light or of flowing water. In each of these cases there must be a long continuance of enjoyment to warrant the presumption. But upon the question of the surrender of a term, the case was somewhat different; for with respect to conveyances you could not find in the nature of things repeated acts; it was not to be expected. And although that were so, the courts had in many instances for a considerable length of time decided that juries were at liberty, where they find that such a term as this has been set up, and has done the duty for which it was originally created, to presume a surrender of it. In this case there was the letter of Downes, admitting that Mrs. Ray had a right to appoint; whence it might be inferred, as against him, that the term did not exist; his Lordship therefore thought the jury were justified in presuming this outstanding term to have ceased. There the grant of the office, supposing such a term to be outstanding, would have been void at law, which certainly it was never meant to be; on the contrary, if the term be presumed merged, the grant of the office would be good. In that view, the Court of K. B. declared itself of opinion, that it was properly left to the jury to presume a surrender of the term, to give validity and effect to the act of the testatrix in making the grant she did. For these reasons the court was of opinion that the verdict found for the plaintiff at the assizes ought not to be disturbed, and judgment was given accordingly. 3 Barn. & Cress. 616.

It is presumed that the same observations would not have been made if the defendant in this case had been a *bonâ fide* purchaser of the office for valuable consideration without notice and the trustee had concurred in his appointment, but whether a court of common law would have taken cognizance of the want of notice, or of the adequacy of consideration are points not definitively settled. It is presumed also (though it is dangerous to presume too much) that although the term for this purpose of justice, and under these circumstances was presumed surrendered, yet under different circumstances and in support of another act of justice, the same term would be treated as continuing; in short, that the presumption of a term's surrender by a jury, does not amount to an actual assignment and yielding up of the term, but only a merger of it

not, in his mortgage made after the plaintiff's mortgage, all

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for the honesty of that particular case. Suppose Downes, the devisee in the above instance, to have acknowledged a judgment, then to have made a *bonâ-fide* sale of the estate to A. B. who had no notice of the judgment, and who took an actual assignment of the term, could the judgment creditor have issued his *elegit* and supported an ejectment against A. B. on the ground of the above verdict, where, for a particular purpose, the term was presumed surrendered, in the teeth of an actual assignment of the term to A. B.'s trustee? It is presumed not, but as the doctrine is not yet carried thus far by decision, this question must remain in doubt, or at least unsettled.

**Observations on
late pamphlet.**

A few observations remain to be made on the above-mentioned pamphlet which at the time so forcibly attracted the attention of the profession. Equity lawyers must reprobate the introduction of equitable doctrines into courts of law. This being premised, we are in possession of nearly the whole total amount of objection to the late case of *Doe v. Hilder*, as summed up by the learned author of that ingenious pamphlet. The *dicta* of the present Chancellor are much relied on, to shew his dissent from the decisions which have been pronounced by the court of King's Bench on this subject. But Lord Eldon does not boldly and decisively declare, that he would consider a term subsisting, which the Judges on his right hand would presume surrendered. In equity there is no settled *data* on the subject; in fact, nothing but doubts and (what the editor conceives to be, when attentively investigated) unwarrantable inferences from Lord Hardwicke's observations in *Willoughby v. Willoughby*, which Lord Hardwicke himself would never have sanctioned. And it is very remarkable, that the learned author of the pamphlet under consideration should place so much stress on the very observations of Lord Hardwicke, which by his own shewing, in his excellent Treat. on Vend. & Pur. p. 368, 5th edit. are never relied on in practice. To the quotation from Lord Hardwicke's judgment in *Willoughby v. Willoughby*, as expressed in the words of the firstly cited case in this section of the note, the learned gentleman adds, (Sugd. Vend. & Purch. 368, 5th edit.) "This however is never relied on in practice." It may then be asked, why so strenuously propose it in theory, as the basis of an argument, against an unanimous decision of the four Judges of the Court of King's Bench?

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**Objection from
rule at law in-
terfering with
rules in equity
answered.**

The rule at law, it may be said, interferes with the equitable doctrines of notice and priority, so that if a mortgagee without notice of previous judgments and incumbrances, were to procure an assignment of an outstanding satisfied term, which had been once assigned to attend the inheritance, he is afterwards to be told that the term which he has thus acquired with so much caution and diligence, will, in a court of law, be presumed to have been surrendered; and therefore that in the end it will prove perfectly useless to him: and hence it may be said a mortgagee or purchaser can never know when he is safe. But it should be remembered, that the rule in equity as to priority is, that he who has the legal estate, which is available at law, has the preferable title; and therefore it behoves a purchaser or mortgagee, before he takes an assignment of a term, to ascertain whether it comprises such a legal estate as will support an ejectment at law, and is

the lands mortgaged before to the plaintiffs, but only part

a term in no way liable to be impeached or affected by the above doctrine of presumed surrenders. Stating the equitable rule at this, the rule at law, so far as it has gone, may now be considered as exhibiting a clear and certain *postulatum* for ascertaining the cases wherein surrenders may be presumed, which in general terms may be described thus :—The court will presume a surrender of the term, if there are any circumstances affording inference, that the parties on former changes of the property, considered the term as merged and extinct; and their not taking an actual assignment of it, or a declaration from the trustee, at a time when there is every reason to suppose they had the means of making themselves acquainted with the creation and subsequent assignments of the term, will furnish good evidence to presume their abandonment of all benefit to be derived from it; and of a consequence, since the term can be serviceable to no other persons, their consideration that the term is extinguished and gone.

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There must be something to keep alive the term from time to time. A recital that the term is existing, in a deed which is executed by the trustee; the mention of the term in a special case, or in a special verdict as a bar to recovery; a declaration by the trustee that he stands possessed of the term in trust for a new purchaser or mortgagee; and an actual assignment of the term in trust for the purchaser or mortgagee on every substantial change of ownership, are among the circumstances which it has been held will be sufficient to prevent the presumption of a surrender; but the mere mention of the deeds creating and assigning the term, and a declaration by the parties without the concurrence of the trustee that all terms shall be held in trust for the purchaser or mortgagee, will not, it seems, be enough to rebut the presumption that the term has been surrendered. And here it may be asked, (with these propositions in view)—Is it difficult to say in what cases terms for years may be presumed to be surrendered, or in what cases terms for years may be relied on? Is there that confusion in the doctrine—that removal of the ancient land-marks of real property—that discrepancy between the old and modern doctrine of the court, as is stated or hinted at in the above-mentioned pamphlet? or is there any reason for charging the court of King's Bench with proceeding on an arbitrary rule, as imputed by another ingenious pamphlet; see “An inquiry whether attendant trust terms are liable to the execution of a judgment creditor, by Robert Gream Hall, Esq.” p. 36? Is there any discordancy between the judgment in *Doe v. Hilder* and the judgments and opinions of the learned common law Judges in the ten preceding cases on this head of law? Can observations be well founded, which on a review of these ten previous decisions terminate in doubts, whether a surrender ought to have been presumed in *Doe v. Hilder*? And when it is said, “there was no circumstance [in that case] which pointedly called for an assignment of the term before the period when one was made,” it may be further asked, (conceding the point for argument's sake, that no assignment was necessary on the descents and marriage,) was not an assignment absolutely requisite on the mortgage to Mrs. Newman in 1816? And the language of the court highly favors the supposition, that if an administration had been

What circumstances will rebut presumption of surrender.

thereof, and that the statute covered the whole; and that, al-

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then taken out, and the term at that time actually assigned, being in fact nearly four years before the commencement of the ejectment, instead of nearly a year after it (a circumstance much relied on by the court), no presumption that the term was surrendered would have arisen. It is impossible to anticipate the judgment of the court in such case; but every probability concurs to warrant the supposition, that such would be its determination.

Case since Doe v. Hilder, where held that general declaration of trust, with mention of deed in schedule, enough to keep term alive.

Indeed, the learned author of the pamphlet so often alluded to has stated in a fourth edition, that since the report of *Doe v. Hilder*, an ejectment was brought at the assizes for Sussex, by other claimants, against Putland, who recovered in the former ejectment, and that upon proof of a mortgage in fee to one Thomas Markwick, in 1814, by Richard Newman, the son, who afterwards made the marriage settlement, (which mortgage contained a general declaration of trust of all terms of years for the mortgagee, but without any specific allusion to the term in question, except what arose from the mention of the deed creating it, in a schedule to such mortgage,) the term was decided to be subsisting, and not surrendered, as presumed on the former trial. Now though it is conceived that this general declaration and allusion to the term by schedule, would not, in consistency with the eleven previous decisions of the Court of King's Bench, be enough to warrant the determination which is stated to have ensued, yet it shews sufficiently, that if in *Doe v. Hilder* there had been an actual assignment of the term four years previously to the commencement of the action of ejectment, the term would not have been presumed surrendered.

That law questioned.

In the case at the Assizes it is obvious that the court and parties proceeded on the same general idea, that some recent recognition of the term was necessary to continue its existence, for otherwise why should the mortgage (which it is presumed was satisfied) have been adduced, but merely to shew that the parties in 1814, considered the term as subsisting? The mere general declaration and schedule were, it is conceived, insufficient for that purpose, or supposing them sufficient, then the mortgagee knew that the legal estate was outstanding, and yet run into danger with full warning of the consequences; conduct which, in common fairness, ought not to be attributed to him. Again, can it be supposed that the mortgagee would have advanced his money if he were aware that there was any probability of losing it, which must have been the case if the term be considered as subsisting and outstanding when the money was advanced. The truth is, that having the deeds creating and assigning the term (the best evidence of a surrender next to an actual assignment), he in reality considered the term as presenting no hostile appearance, which he could no otherwise do than by considering it as merged? but out of caution a general declaration is added; and the deeds creating and assigning the term, must of necessity be mentioned in the schedule, and therefore no general allusion to them can of itself afford any indication of intention, that the term was specifically singled out as an existing interest or estate in the premises. It has been more than once determined, that neither a general schedule of deeds, nor a declaration of trust to which the trustee is not a party, will separately be sufficient to raise the presumption that the term was subsisting, and their

though the defendant B. might, by the purchase of the statute,

combined effect must, it is conceived, be equally impotent. An important, though unintended concession is yielded by these new facts:—

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The production of additional circumstances raises the presumption that the circumstances before adduced, were not considered sufficient. The parties in the *size-cause* exemplify this position. They produce the mortgage of 1814, and obtain a verdict on the merits of a clause found in that deed. Without that clause the case would have exactly resembled the previous case of *Doe v. Hilder*, where a different verdict for the want of a similar, or rather a stronger clause, was recorded. The clause therefore in the deed of 1814, is highly essential to the question of law. In fact, the point of law turns entirely upon it. And the learned author of the pamphlet under consideration, evinces a similar conception of the importance of the additional circumstances (though for a different end) by bringing them forward in the fourth edition of his pamphlet. If, then, it be admitted that these new facts are material to the point of law, it follows that a suspicion of the correctness of that law, without those additional facts, must be ill founded and misplaced.

Argument af-
forded by it in
confirmation of
Doe v. Hilder.

Then, it is said, the presumption in *Doe v. Hilder* has let in the judgment creditor on the estates provided for the wife and children by the marriage settlement. It is true, it has, and the only way to have prevented that would have been to have taken an assignment of the attendant term at the time the marriage took place, which shews that an actual assignment of the term was necessary to shelter the uses and estates limited from the settlement from latent incumbrances; and though it may not be a common case to assign attendant terms on such occasions, yet there is no well-founded reason for the omission: and now every prudent practitioner will remember to call for an assignment of all outstanding attendant terms on marriage transactions, and will either combine that assignment in the marriage settlement, or effect it by a separate instrument. And it is worthy of remark, that though of late years it may not have been the practice on marriage settlements, to re-assign attendant terms to new trustees, yet two instances of such assignments are preserved by Mr. Newman, in the second volume of his *Conveyancer*, (8vo edition) ps. 394 and 407, the first, "an assignment by indorsement of a term to attend the uses of a marriage settlement," drawn by Mr. Morgan, and the second, an "assignment of a term by a separate deed in trust to attend the uses of a marriage settlement," drawn by Mr. Horsman; and such a declaration of trust to wait on the uses of a settlement is a common form to be found in most manuscript collections of precedents.

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Necessity of as-
signment of
terms on mar-
riage transac-
tions.

Strictly speaking, every term at law is a term in gross. The attendancy is in equity, and courts of law ought not, neither do they to the full extent of the words, look into or regulate the mode and manner of that attendancy. There must then be a subsisting term at law before a court of equity can clothe it with a trust; there must be the basis of an unimpeachable legal estate before the superstructure of a trust can be erected on it. It is therefore a preliminary inquiry to ascertain at law whether the term be existing. If, then, we find that A. purchased the estate twenty years ago, has been in possession ever since, has the custody of the deeds creating and assigning the term to a

Illustration of
different bear-
ings of rule in
law and equity
on attendant
terms.

therein. But the Chancellor was strongly against the plain-

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Holman Ex parte, Sng. V. & P. 428, the case was this :—

| | | |
|-------|-----------------------|---|
| 1735. | Baker to Marsh. | } Mortgage by demise for 500 years for securing 200 <i>l.</i> and estate absolute, by non-payment at the day. |
|-------|-----------------------|---|

1749. The term incidently mentioned in a deed of this date.

1750. Indorsement on the mortgage deed, whereby the money was acknowledged to have been received.

1784. Sale of the property, no notice of the term.

1791. Sale of the property, no notice of the term.

1792. Sale of the property, no notice of the term.

The Vice-Chancellor was of opinion that a surrender of the term was to be presumed against the opinion of the Master to whom the cause stood referred, and who required the representative of the mortgagee to be found.

Emery v. Grocock, 6 Madd. 54. In this case the question was, whether on a reference as to title, a term for raising portions created by a settlement of 1711, ought not to have been presumed surrendered. A cesser of the term was provided for in the event of the trusts never arising, but not in the event of their arising and being satisfied. There were several daughters, but no evidence that the portions were satisfied. In 1744, a recovery was suffered, and one of the settlors covenanted that the estate was free from incumbrances, but no disposition or assignment appeared to have been made of the term at any time. The purchaser's counsel contended, that an incumbrancer might get in this term and use it prejudicially, as in *Doe v. Scott*, 2 East, 478.

The Vice-Chancellor :—"There is no evidence of the portions paid ; but the parties entitled attained their ages of twenty-one about sixty years since, and are all dead ; and it appears by the abstract, that the family has long dealt with the estate as if there were no term and no portion due. A Court of Equity will not compel the acceptance of a title where there is reasonable doubt in law or in fact. In law, strictly speaking, there is no doubt ; but, practically, there is often a doubt as to the application of settled principles. In matter of fact there is doubt, where the testimony is direct ; because it may be given *malâ fide* ; or if *bonâ fide*, by mistake : there is still more doubt where matter rests in presumption, for all presumptions may be answered. In assuming the jurisdiction of a specific performance, Courts of Equity are compelled to grapple with these difficulties ; and the only rule that they can adopt in cases of presumption like the present seems to be, that if the case be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favor of the fact ; then it is to be considered as without reasonable doubt ; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser. There is here, first, a clear presumption that the purpose is satisfied : next, there is presumption that the necessary term was surrendered, because it is not subsequently noticed in the transac-

tiffs on this point, and a question of fact arising, the case went off upon propositions.

tion of the family : and, lastly, there is the absence of all evidence that this term was ever applied to any new purpose. In this case, I should consider it my duty to give a clear direction to the jury, that they were bound to find the term surrendered; and, I must therefore hold that there is no sufficient doubt to entitle the purchaser to be relieved from his contract." 6 Madd. 58.

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Cooke v. Soltan, 1824, 3 Sim. & Stu. 154. The following abstract will best explain the facts of this case :—

1733. Cooke
to
A. B. } Mortgage in fee.
1734. Will of Cooke. Devise of equity of redemption to Child and Lockwood, in trust to pay the rents to his wife for life, and after her decease, in trust to pay the rents to his son John Cooke, and permit him, his heirs, executors, administrators, and assigns, to hold and enjoy the premises.
[Note, It is considered that John Cooke took the legal estate in fee under this will, and that the estate of the trustees was confined to the life of the wife.]
1736. A. B. the mortgagee
to
Child & Lockwood. } Reconveyance on payment of mortgage-money.
1741. Death of Child.
1745. Lockwood and
testator's wife
to
Johnson. } Mortgage in fee for raising 300l. for purposes of the will.
1791. Cooke the son
to
Watson. } Mortgage by demise for securing 3500l. no notice of legal estate outstanding in Johnson.
1815. Cooke
to
Clay. } Grant of annuity, no notice of Johnson.
1818. Lockwood's heir
to
Cooke. } Reconveyance.
1820. Cooke
to
Soltan. } Contract for purchase.

Under these circumstances, Soltan required a reconveyance from the heir at law of Johnson. Cooke objected that Lockwood had no power to make the conveyance to Johnson, except for the life of the testator's widow, and that her interest having long since ceased, Johnson's estate was gone. He also

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said, that search had been instituted at Doctors' Commons for the will or administration of Johnson, and that he had also endeavoured to find out his heir, but without success;—That in an old abstract made in 1791, (upon the treaty for the loan of the 3500*l*.) there was the following note, “N. B. This 300*l*. and all interest has been paid off near forty years, if not more, and the present Mr. Cooke in quiet possession ever since he attained twenty-one.” It was also stated that the Conveyancer before whom the abstract was laid, wrote the following opinion on the title:—“Although it does not appear that either the mortgagee reconveyed the real estate to Mr. Cooke, or that the surviving trustee in his father's will conveyed the equity of redemption to him, yet, from the assertion at the foot of the abstract, (to which, from my own personal knowledge, the greatest credit is due,) and as a possessory action (unless under very particular circumstances indeed) cannot be brought after this lapse of time, I do not think a mortgagee will run any risk in accepting this title.”

The plaintiff also contended, that as no administration could be found, it proved clearly that the mortgage money had been satisfied; for if not, some person would have been induced to administer to the mortgagee for the purpose of recovering it. That if, under the circumstances of this case, the title was not good, it was impossible to conceive how it could ever be made good. The personal representative of the mortgagee could not claim the money, nor the heir the estate. If an action were brought by the heir at law of the mortgagee, to recover this estate, there was no judge who would not direct a jury to presume a reconveyance of the legal estate. If the mortgagee died without an heir, no jury would presume an escheat after a possession of seventy years.

For the defendant it was urged, that in the case of mortgagor and mortgagee there is not any time in which the possession becomes adverse; for it is the practice for the mortgagor to remain in possession. A long possession, in order to be a ground for presuming a reconveyance, must be adverse. *Fauvel v. Reed*, 1 Meriv. 114. If a mesne incumbrancer were to get a conveyance of the legal estate, it would be no objection to his availing himself of it, that the mortgage money had been paid. This is the case of trustees of the equity of redemption, who, having paid off the mortgage money, create another mortgage in fee for the purpose of enabling themselves to perform the trusts of the will. That objection, therefore, would not hold. How did the plaintiff prove that there was not a counterpart of the mortgage deed? If there were, and it was executed by all the parties, there was an end of the question. There were no intermediate deeds executed from 1745 to 1791; so that no aid could be derived from that circumstance. There was no indorsement on the deed of payment of either principal or interest.

The Vice-Chancellor.—“I adhere to the principles of *Emery v. Grocock*. No reconveyance could ever be presumed without the actual production of the deed, unless it could be properly presumed in this case.” 2 Sim. & Stu. 163.

General rules for determining when a term may be presumed to be surrendered.

To conclude this section of the note with some concise practical deductions, as far indeed as those deductions can be made in the present state of the doctrine, it may be stated,

1st. That the Court of King's Bench has uniformly evinced a disposition to presume a surrender of the term, when it is set up as a defence in ejectment.

2d. That

2d. That whether the presumption be in favor of, or in opposition to the real owner, it will not make any difference, if the circumstances are sufficient to warrant the presumption. ATTENDANT TERM.

3d. That the presumption will arise, if on a change of property, (except perhaps in the instances of a descent or devise), wherein the title is or ought to be investigated, the term be passed over in silence, when the parties had every means of knowing that the term was existing. The title is or ought to be investigated on sales and mortgages, but whether it should be investigated pending a treaty of marriage, has not yet been decided in express terms. No particular time is necessary in or beyond which such changes of property are to take place.

4th. That a declaration by the trustee; a recital that the term is subsisting in a deed executed by the trustee; a special verdict or a special case reciting the term as an existing estate; and an actual assignment of the term, will, singly, be sufficient to prevent the presumption.

5th. That the mere mention of the deeds in a covenant to produce deeds, or a general declaration, not signed by the trustee, will not be enough to continue the term. But the case stated by Mr. Sugden, as having been determined at the assizes, it must be recollected is contra, see ante, p. 507.—And,

6th. That whether the term has been assigned to attend the inheritance or not, appears now to be of little consequence; but the term must be satisfied, otherwise no presumption will arise. And the court will in no instance presume the satisfaction of a mortgage, (that is, that the money has been paid,) in less time than twenty years.

Thus, in *Doe v. Calvert*, 5 Taunt. 170, a mortgage term eighteen years old, was set up as a defence to an ejectment. The counsel for the plaintiff urged, that as there was no proof, that any interest had been paid of late years on the mortgage, it might be presumed to be surrendered; and Graham, B. at the trial in the country, being of that opinion, the jury found a verdict for the plaintiff. Mansfield, C. J. however thought there was no circumstance to lead to the supposition that the deed was surrendered, except the eighteen years' time; and observed, that if the deed had been assigned or surrendered, the instrument whereby it had been assigned or surrendered ought to have been in the possession of the plaintiff. No reason was assigned to account why it was not there. The question was, therefore, whether from the circumstance of the eighteen years only, a surrender could be presumed. Sir James Mansfield had never known any case, in which a shorter time than twenty years had been held sufficient to ground a presumption of the surrender, and that was often too short a time, for in many instances receipts and documents might be lost; but it was enough to say, that twenty years was the time prescribed by act of parliament, as a bar to an ejectment, by analogy to which the doctrine of presumption had gone; and a presumption might as well be raised by five years in assumpsit, or three years in trespass, as by eighteen years in ejectment.—As to this, see ante, 399, *in notis*.

Mortgage not presumed satisfied in less than twenty years.

V. It is a prudent rule with conveyancers to recommend, that nearly all terms for years, however ancient they may be, and whatever adverse possession or fines there might have been, (especially if the least doubt exists as to the merger and extinguishment of the term,) should be assigned to a trustee of the mortgagee's nomination, to secure his money, and afterwards to attend

When assignment may be dispensed with.

If puisne incumbrancer can use satisfied statute or judgment at law, equity will not hinder him.

And if a puisne incumbrancer or purchaser get in a satisfied judgment (*p*), or a prior statute, or judgment, or recog-

(*p*) *Edmunds v. Povey*, 1 Vern. 187. 2 Cha. Ca. 208. Hardr. 318. Sed vide Hardr. 172, contra.—[But now over-ruled by the authority of numerous subsequent cases, of which *Edmunds v. Povey* was the first. That

case is considered by the author of the Treatise on Equity as having long since settled the point stated in the text, which he thinks the court will not now suffer to be stirred. Trea. on Eq. lib. 3. c. 3. s. 2.—Ed.]

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the inheritance. A mere declaration by the parties without the concurrence of the trustee, whereby the equity and priority of the parties shall remain unchanged, must certainly be condemned, as pregnant with the most pernicious consequences. But a declaration by the trustee himself, that he will stand possessed of the term in trust for the mortgagee, and then to attend the inheritance, is less objectionable; and in the case of a mortgage may be relied on with tolerable safety; but still an actual assignment is preferable, since the trustee may, either from motives of favor to the mortgagor, or from like motives to an intermediate or prior, or even subsequent incumbrancer; or he, from forgetfulness, or his representatives, from ignorance of the declaration; or he and his representatives from motives less honorable might, at the risk of its being declared a breach of trust, make an actual assignment of the legal estate for the benefit of a person having equal equity with the mortgagee; and in that case the assignment so made would seriously prejudice him, by giving to the other party a decided priority: unless, indeed, it could be proved, that the person to whom the term was assigned, had actual notice of the ancient trusts and subsequent changes of the property; for then it seems, (according to the general doctrine, that he who takes from the trustee with notice of the trust, will himself become the trustee,) that the person to whom the term is assigned, will become a trustee for the mortgagee. But without clear proof of such notice, the assignment will leave the mortgagee merely a remedy against the person of the original trustee, or against his assets in the hands of his representative. Hence, a decided preference is justly conferred on an assignment, to a mere declaration of trust by the trustee. In the other scale, nothing is opposed but the *expence* of an actual assignment, which, in comparison to the advantage obtained and the prejudice prevented, must be looked on as light as air.

Assignment preferred to declaration, though accompanied with deeds.

Few instances, therefore, can occur, where it would be prudent or just to the mortgagee's family and connexions, to advise that an actual assignment should be dispensed with; and though it has even been held, that the custody of the deeds, accompanied with a declaration of trust of the term, is, as against a bare declaration of trust, tantamount to an actual assignment, (*Stanhope v. Verney*, Butler's n. (1), s. 15, to Co. Litt. 290 b.) yet, from the force of the learned author's observations, as delivered above, in p. 510 of the text, it is scarcely ever prudent to dispense with an actual assignment of an outstanding term; for he has fully shewn, that a case may occur in which an assignment of a term would be preferred to a declaration of trust, though

nizance, although it be paid off, yet if he can make *use of it at law*, equity will not interfere to hinder him.

accompanied with the deeds; and nothing, it is conceived, can be inferred to the contrary from the case of *Belchier v. Butler*, 1 Eden, 523, cited ante, 455, *in notis*; for the successful party in that case had, prior to the decree, both the legal estate and the deeds.

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It is merely necessary to subjoin here the three general rules laid down by Mr. Butler in his learned and practical notes to Co. Litt. respecting the cases in which a purchaser or mortgagee should or should not dispense with an assignment of outstanding terms, in order that the student might be in possession of the entire learning on this head of law at one view:—"1st. It may be laid down as a general rule, that whenever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive, to a trustee for the person obliged to pay, the money, is the best possible evidence of the payment of the money, it may be reasonably required as such. 2dly. In case a term of years has been assigned to attend the inheritance, if, upon a purchase (taking it in the most extensive sense), all the deeds (as well original as counterparts), by which the term was created or assigned, are delivered to the purchaser, and he is satisfied that the trustee, in whom it is then said to be vested, has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance; it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate. 3dly. But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee's not having previously assigned it, or of the vendor's having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him. Few general rules beside these can be laid down upon this subject, and these must, from their nature, be subject to an endless variety of modifications. In all cases of this description it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt but the precautions used for the security of purchasers, appear sometimes to be excessive, and satisfactory reasons cannot always be given for requiring some of them; yet the more a person's experience increases, the more he feels the reason and real utility of them, and the more he will be convinced that very few of the precautions required by the general practice of the profession are without their use, or can be safely dispensed with." See 15th sec. of n. 1, to Co. Litt. 290 b. 17th edit.

Mr. Butler's
rules as to dis-
pensing with as-
signment of
terms.

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VI. Of various other matters relating to attendant terms.—From the rule that the owner of the fee is in equity entitled to all the benefit and advantage which can be made of the term during its continuance, and that the termor will not be permitted to obstruct the proprietor of the fee in any act of ownership, or in making any assurance of his estate, it follows, that the equitable interest in the term will in fact devolve in the same channel, and be governed by the same rules as the inheritance. It will follow the descent

Term descends
as real pro-
perty;

Mortgagee preferred to jointress, he having a prior satisfied statute.

So, where the plaintiff was a jointress (*q*), and the defendant a mortgagee subsequent, who had got an assignment of a statute that was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged; the bill was to set aside

(*q*) *Sadler v. Bush*, 2 Vern. 30.

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continued.

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never severed but for creditors;

cannot be entailed;

follows uses of inheritance;

Attendant term is real assets;

and is subject to dower and curtesy; but not to custom of London.

Search for judgments rarely to be dispensed with, by reason of assignment of outstanding term.

of the inheritance to the heir, and on the death of the ancestor it will vest in his personal representative for the heir's benefit, but the executor will take it, it seems, as a term, which consequently must go in a course of administration, and not in a course of descent. *Levet v. Needham*, 2 Vern. 140. It will not pass by a will not executed pursuant to the statute of frauds, *Villiers v. Villiers*, 2 Atk. 72. S. C. Barn. 307. *Tiffin v. Tiffin*, 2 Ch. Ca. 49. 55, unless an intention, clearly expressed, to pass the term is apparent; see 9 Mod. 127. 2 Coll. Jur. 276, nor is it ever severed in favor of an heir or executor, yet it seems there are cases where it has been done on the behalf of creditors. *Cooke v. Cooke*, 2 Atk. 67. *Goodright v. Sayles*, 2 Serj. Wils. 331. Though a term cannot be entailed, yet it may wait on the inheritance which is entailed; and when it is thus limited, it is not properly an entail within the statute *de donis*, but governable partly by equity and partly by law. 3 Ch. Ca. 3. It follows all the alienations made of the inheritance, or of any partial estate or interest carved out of it by deed or will, or by act of law. It is an accretion of the inheritance, and affected in the same manner as the inheritance, and governed by the same uses. 3 Ch. Ca. 4. 10. 11. 23. 20. Therefore it will not be forfeited by the felony of the owner of the inheritance, *Attorney-General v. Sands*, 3 Ch. Rep. 19. 33. 2d edit. S. C. Hardr. 486; but if the inheritance escheat, the term will go with it. *Thurston v. Attorney-General*, 1 Vern. 340. 357, ante, 252.

It will be real assets, if it attend an inheritance in fee, but not if it attend an estate tail, *Attorney-General v. Sands*, Hardr. 489, and it will, as against the heir (*Wray v. Williams*, Pr. Ch. 151. 1 P. Wms. 137. Hard. 489), or assignees of a bankrupt (*Squire v. Compton*, 9 Vin. Abr. 227, pl. 60), be subject to dower and curtesy. *Dudley v. Dudley*, Pre. Ch. 241. *Williams v. Wray*, *ubi supra*. *Hill v. Adams*, 2 Atk. 209. *Dormer v. Fortescue*, 3 Atk. 124, ante, of this note, sec. III. 3. But it will not, by the custom of London, be reckoned as a chattel, and devisable as such among children. *Rich v. Rich*, 2 Ch. Ca. 160. Where a term was created, and no trusts declared, and the estate was devised for life with remainder over, the court decided there was no resulting trust as to the term, but that it attended the inheritance. *Sidney v. Miller*, Coop. Rep. 206, over-ruling the dictum in *Browne v. Jones*, 1 Atk. 191. It is also to be noted, that an injunction to restrain the setting up of an outstanding term, in bar of an ejectment, will not be granted upon motion. *Barney v. Luckett*, 1 Sim. & Stu. 419. *Northey v. Pearce*, 1 Sim. & Stu. 420.

Finally, it is worthy of remark, that the protection afforded by terms of years against mesne incumbrancers, makes it safe, in some cases, to dispense with a search for judgments. See 1 Madd. Ch. 508, 2d edit. n. (m), where it is laid down "that a purchaser of an equitable estate, with an outstanding term, should never search for judgments, for thereby he fixes himself with

the extent; but the Master of the Rolls decreed, that it should not be set aside but upon payment of principal, interest, and costs.

A prior incumbrance, satisfied at law, will protect a subsequent incumbrancer in equity, although no consideration were paid for it (*r*); or, if the consideration were by way of exchange; because the having the deed, or an acquittance, is sufficient for that purpose.

Prior incumbrance, though satisfied at law, will protect subsequent incumbrancer in equity.

Thus (*s*), where the plaintiff lent I. S. 600*l*. on mortgage, and afterwards, discovering that the estate was pre-mortgaged to the defendant, got in an old satisfied term, and then brought his bill to compel the defendant to redeem or be foreclosed; it was objected, that the plaintiff in this case (as between him and the defendant, who was a purchaser), ought to have proved the actual lending and payment of the consideration money for such precedent incumbrance; and that the producing the deed, or an acquittance, was not sufficient; but the court held that this was not necessary.

Third mortgagees need not prove actual payment of money for prior incumbrance.

The law is the same (*t*), although the incumbrance, set up as a protection, be obtained by fraudulent means; as, where

Mortgagee protected, though prior incumbrance be obtained by fraud, (sed qu.)

(*r*) *Churchill v. Grove*, 1 Ch. Ca. 35. 1 Eq. Ca. Abr. 323, pl. 3. [*S. C.* infra, vol. ii. 597. So in *Hitchcock v. Sedgwick*, 2 Vern. 158, it was held, that when a purchaser buys in an old statute or mortgage, though nothing is due upon it, yet in equity he shall defend himself by it. So he shall, it was said, though he get in this prior incumbrance by undue means; see also 2 P. Wms. 493. 2 Vern. 29. Nels.

Ch. Ca. 89, post, 540. Et infra, vol. ii. 591, 2.—*Ed.*]

(*s*) *Holt v. Mill*, 2 Vern. 279. *S. C.* 1 Eq. Ca. Abr. 323, pl. 3.

(*t*) 2 Vern. 159. *Siddon v. Charnell*, Bunb. 298. *Shirley v. Fagg*, case cited, 1 Vern. 52, 53. 2 *ibid.* 58, reported 1 Ch. Ca. 68. sed vide contra *Gilb. lex pratoria*, 248. Et vide *Strode v. Blackburne*, supra. [3 Ves. 222. *S. C.* post, vol. ii. 637.—*Ed.*]

notice." But this is seldom prudent, and never advised, where there is the slightest reason to apprehend that notice of the incumbrance can or will be attempted to be proved on the party or any of his agents in the business.

But, on the other hand, no term or other outstanding estate should be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law, which must be proved to establish the creation and deduction of the term. See Co. Litt. 290 b. n. 1, s. 15, 17th edit.

one being a purchaser, came into a man's study, and there laid hand on a statute that would have fallen on his estate and put it in his pocket; in that case, he having obtained an advantage at law, the court would not take it from him, though procured so unfairly, and by so ill a practice (B): *sed quære*.

But, where the prior incumbrance taken in is deficient in those requisites which are necessary to give it legal efficacy, no protection can be derived from it. As if a recognizance, bought in, hath not been enrolled in proper time.

And though the court may, on application, interpose, and, by their special order, supply the defect as to persons who come subsequently to such interposition, yet it will not overreach an intermediate incumbrancer.

Recognizance enrolled after due time elapsed, judgment in the interim preferred in equity.

Upon this principle (u), where a recognizance was enrolled by special order of the court, after the time for enrolment had elapsed, and it so happened that the plaintiff, between the date and enrolment of the recognizance, lent money to the conusor, and took a judgment for his security which was overreached by the recognizance, *that* being made good by the subsequent enrolment, the court (the estate being in mortgage before, and the conusor having only an equity of re-

(u) *Fothergill v. Kendrick*, 2 Vern. 234, et vide 1 P. Wms. 340.

Deed stolen from window allowed to be used by purchaser without notice.

(B) For the practice, it is said, is not material to secure a just debt. Treat. on Eq. lib. iii. c. 3. s. 1. This is carrying the doctrine to a great length, and is little accordant with the sentiments of repugnance which the court has so often expressed at any thing like fraud or unfair conduct. Indeed, in one case, the court is reported to have allowed a purchaser for valuable consideration and without notice, to take advantage of a deed which he stole out of a window by means of a ladder. *Sanders v. Delinge*, 2 Freem. 123. And in another case of a deed obtained by a third person without consideration and by fraud. *Harcourt v. Knowell*, cited 2 Vern. 159. In the report of the case of *Shirley v. Fagg*, cited in the text, the circumstance of theft does not appear. The learned author has very rightly added a query to this paragraph, for it is more than probable that the court would at this day reverse a doctrine so incongruous with principles, which it has lately professed most rigidly to observe, et vide post, 518.

Author's query rightly placed.

demption in him, so that neither the recognizance nor mortgage could affect it without the assistance of the court), inclined to give the preference to the judgment creditor.

So, if judgment be not docketed within the time limited by the statute 4th and 5th William & Mary, c. 20 (c), it will not protect a *puisne* incumbrancer, although the *eigne* incumbrancer hath actually notice of it at the time of making the mortgage.

Judgments not docketed in due [514] time, lose their preference (D).

(C) By this act it is required that the clerk of the essoigns of the Court of Common Pleas, the clerk of the doggets of the Court of King's Bench, and the Master of the Office of Pleas in the Court of Exchequer, for the time being, do, before the last day of Easter Term, make, or cause to be made, and put into an alphabetical dogget, by the defendants names, a particular of all judgments for debts by confession, *Non sum informatus*, or *Nil dicit*, entered in the said respective courts of the Term of Saint Hilary preceding, which shall contain the name of the plaintiff, the name of the defendant, and his respective place of abode, title, trade, or profession, and the debt, damages, and costs recovered thereby; and also, that every clerk of the judgments aforesaid, shall, within ten days before the time aforesaid, bring to the respective clerks of the doggets of the said respective courts, notes in writing of all the judgments by them and every of them respectively entered of the said Term of Saint Hilary, upon verdicts, writs of inquiry, demurrer, and every other judgment for debt or damages, in all things as aforesaid, to the end the same may be respectively entered in the respective doggets before-mentioned; and the same is required of the judgments entered in Easter and Trinity Terms, which are to be doggeted, before the last day of Michaelmas Term, and the judgments in Michaelmas Term are to be doggeted before the last day of Hilary Term; and it is further required, that the said respective doggets be fairly put into and kept in books in parchment, in the respective offices of the respective officers before named, to be searched and viewed by all persons at all reasonable times; paying to the respective officers for every term's search for judgments against any one person four pence, and no more. And it is further enacted, that no judgments not doggeted and entered in the books, as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in the administration of their ancestors, testators, or intestates effects. This act is made perpetual by 7 & 8 W. 3. c. 36. s. 3. For the construction of this last clause of the statute, see ante, p. 275, *in notis*; and for observations on the statute in general, post, 517, n. (z).

4 & 5 W. & M. c. 20. Judgments when to be docketed.

[514*]

Fee for search.

Undocketed judgments not binding.

(D) As against a purchaser or mortgagee such undocketed judgments are reduced to the level of simple contract debts, but they are available as against the defendant himself, and all persons claiming under him, on whom notice of such judgments can be proved before their respective titles commenced. See ante, p. 278, *in notis*.

Notice of undocketed judgment immaterial.

Thus (x), where judgment was signed in June, 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until January, 1730; the Master of the Rolls held, that the docket was not good, being made after the time limited by the statute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the statute being express, that judgments, not docketed, should lose their preference as to *purchasers* and *mortgagees* (E).

Docketing unnecessary as between judgment creditors.

But this exception, as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, or executors, or administrators in the administration of the effects of those of whom they are the representatives (F).

(x) *Forshall v. Coles*, 7 Vin. Abr. pl. 8. [Sugd. Vend. & Purch. App. 54, pl. 6. S. C. 2 Eq. Ca. Abr. 592, No. xix. and ante, 276, n.—Ed.]

Undocketed judgment, unregistered deed, unenrolled bargain and sale, all binding in equity with notice.

(E) This point as to notice of a judgment not docketed being immaterial, has been over-ruled by the late case of *Davis v. Strathmore*, 16 Ves. 419, cited ante, p. 276, in *notis*, where it was held, that a purchaser was bound by notice of a judgment, although that judgment might not have been docketed. In the same case it was held, that a purchaser within the registry act, 7 Anne, c. 20, was bound by notice of a deed not registered; and in a case in 3 Atk. 651, 2, it was decided that notice of a bargain and sale, not enrolled, would nevertheless affect a purchaser.

Of priority between judgment creditors.

[515]

(F) And not to cases where they are set up either against the debtor himself or against subsequent judgment creditors. As to the priority of judgment creditors, each will be preferred according to the priority of his judgment; and should a judgment creditor of a subsequent date first sue out execution and seize the lands, a prior judgment creditor would not be prejudiced. In an ejectment he might recover against the puisne judgment creditor, and all persons claiming under him, in the same manner as he might have recovered against the debtor himself. But the second or subsequent judgment creditor may, in his turn, resort to the land when the former judgment is satisfied, so that he will be postponed only, and not excluded, 3 Pres. Abs. 335; but if one moiety be already taken in execution, a second judgment creditor can take but one fourth, that is, a moiety of the remaining moiety, and so of the like.—As to leasehold estates, the rule is different, each creditor will be preferred according to the priority of his execution, without regard to the priority of his judgment. Thus, where a debtor had been sued to judgment by a creditor who was entitled to sue out execution on the 8th May, on which day the debtor voluntarily went to another creditor and gave him a warrant of attorney

And so it was held in the case of *Robinson et al v. Harrington* (y), which came before the court upon exceptions to the Master's report. The case appeared to be this: in 1739, the defendant gave a bond for 400*l.* to Sarah Green, and, in Trinity Term, 1744, the obligee brought an action against the defendant upon this bond, who pleaded the general issue; and the issue roll upon which the same was entered, was regularly carried in of the term in which the issue was joined; but the cause was never tried, the parties being under an agreement to compromise the same: however, the plaintiff entered continuance upon the roll regularly, by *non misit breve*, till Michaelmas Term, 1745, when the defendant withdrew his plea and confessed judgment. The clerk of the judgments then entered up final judgment upon the issue roll, but never took any docket of the same to the clerk of the essoigns, which, according to the statute 4th and 5th William & Mary, c. 7, he ought to have done; when, therefore, the judgment creditor came before the Master, though the judgment appeared to be signed 29th May, 1745, he postponed it to other judgments of 1784, because Mrs. Green's judgment was not docketed with the clerk of the essoigns.

Judgments from
what time they
bind real estate.

(y) Hil. Term, 1778.

to confess judgment against him, on which judgment was immediately entered up, and execution levied on the same day two hours before the first creditor's execution reached the sheriff's office; it was held, that the preference was not unlawful nor fraudulent, within the meaning of 13 Eliz. c. 5. *Holbird v. Anderson*, 5 T. R. 235. So in *Hutchinson v. Johnson*, 1 T. R. 729, cited in *Payne v. Drewe*, 4 East, 543, and ante, 280, in *notis*, it was held, that where two writs of *fiery facias* against the same defendant are delivered to a sheriff on different days, and no actual sale of the defendant's goods is made, that the first execution must have the priority. And the sheriff must, as between himself and the several plaintiffs in those executions, sell under that writ which is first delivered, although he may have first seised under the lastly delivered writ. In like manner, if there are different writs or authorities, each so far binding the goods as to warrant a sale under them, one delivered to the sheriff, and another previously delivered to other persons equally competent with the sheriff to seise the goods (as a sequestrator under a commission out of the Court of Chancery), the goods will be considered effectually bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed; see also 2 Marsh. 374.

Robinson
v.
Harrington.

ference against heirs, executors, or administrators, in the administration of their ancestors, testators, or intestates estates. But this did not take away the right which a judgment creditor had by the statute of Westminster to extend the lands of his debtor; it only laid him under particular restrictions in particular cases, which Mr. Strafford did not come within the meaning of.

Judgment binds
lands from time
of recovery,
[i. e. of sign-
ing], and not
from time of
docket (1).

[518]

It was further contended and admitted, that if Mr. Strafford had sued out an *elegit*, and brought an ejectment to recover a moiety of the land of his debtor, he might have laid his demise on the day on which the judgment was recovered; which plainly proved that the lands were affected from the time of the judgment recovered, and not from the time of the docketing. For, if there had been two judgment creditors of the same day, one docketed and the other not docketed (K); and the undocketed creditor had got possession, by virtue of an *elegit*, the docketed judgment creditor could not oust or eject him from the possession, till his debt had been fully satisfied out of the rents and profits; which was agreed to by the court; and Mr. Strafford ordered to stand in priority, according to the signing of his judgment, and his exception allowed.

Release of judg-
ment after it is
bought in, re-
lieved against.

A *puisne* mortgagee cannot be deprived of the benefit of a prior judgment bought in, by a release surreptitiously procured by the intermediate incumbrancer. Thus, where a *mesne* mortgagee, having notice that a *puisne* incumbrancer had bought up a statute precedent to his mortgage, the conusee of which was dead took out letters of administration de *bonis non* to the conusee of the first statute, in order to release it, and procured the officer of the petty bag to vacate the same (a); the court would not suffer him to profit thereby;

(a) *Huntingdon v. Grenville*, 1 Vern. 49.

(I) This is true as against the owner, but as against a purchaser, real estates are said not to be bound until the judgment has been entered and docketed, except the purchaser have actual notice of the judgment. See Sug. Ven. & Pur. 584, 5th edit. 2 Pres. Abs. 305, and ante, 279, in note.

(K) As to priority between judgment creditors, see ante, 514 a, note (F).

but decreed, that the *puise* mortgagee should be restored, and put in the same plight as if the statute had been still in force, and should go to an account upon it; and, if it were already satisfied, or the *mesne* mortgagee would pay what remained due thereupon, then he should be let in (L).

The advantage to be derived from getting in a precedent judgment (b), depends upon the different procedure of the courts of law and equity, in investigating the account on an extent: for although lands are generally extended at much less than their true value, yet, at common law, the conusor, or he that claims under him, has no relief but by bringing a *scire facias ad computandum* (c), in which the conusee does not account according to the true value, but according to the *extended value*, and for the whole statute (M). Whereas, in this case, on a suit in a court of equity, the conusor may bring the conusee to account for what he hath *actually* received; and shall recover all above the debt, the payment of that being all he is in equity entitled unto (N).

Advantage derived from prior judgment. Modes of account in law and equity.

[519]

(b) 2 Vent. 338. 3 Atk. 518.

(c) 4 Co. 69 b.

(L) This is an instance in which equity deprived a purchaser for a valuable consideration of an advantage he had acquired, contrary to the rule laid down ante, p. 516. He does not, however, appear to be a purchaser without notice.

(M) Debt and damages, and *this*, although the extended value be but a third part of the true value. The same law will prevail as to a purchaser; and whether the judgment be brought in before purchase or after, will not make any difference, see Trea. on Eq. lib. iii. c. 3. s. 1. To this Mr. Fonblanque adds, "Quære whether the mortgagee shall not account for what he hath received, if he hath received enough to satisfy the whole of his demand." In equity he will certainly be compelled so to account, according to the rule laid down in the next sentence in the text; but at law it seems settled, that the mortgagee will be required to account for the extended value only. Thus, in *Godfrey v. Watson*, 3 Atk. 517, Lord Hardwicke held, that where a creditor by judgment extends lands by *elegit*, he holds *quosque debitum satisfactum fuerit*; and at law the debtor cannot on a writ *ad computandum*, insist on the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, the court will give it him by obliging the creditor to account for the whole he has received, but as he who comes for equity must do equity, will direct the debtor to pay interest to the creditor, though it should exceed the principal.

Mode of accounting in law and equity.

[519*]

(N) So in *Quarrell v. Beckford*, 1 Madd. Rep. 269, Sir Thomas Plumer, Vice Chancellor declared, that a mortgagee in possession, holding over after

Except where assignee of statute is mortgagee also.

But, where the assignee of the statute extended is also mortgagee, and consequently a creditor for a farther sum, *there* he hath equal equity on his side to retain the lands until he is satisfied, both for the statute and the mortgage; therefore he will not be brought to account for what he hath received *above* the statute debt, on the extended value, unless he hath received enough to satisfy his mortgage also. Consequently, if a *mere* mortgage would take off a statute in the hands of a *puise* mortgagee, by a suit in equity, the account must be, as at law, upon the extended value for what is due on the statute and damages.

How far judgments, &c. protect subsequent incumbrancers.

And, in such case (*d*), where a statute, recognizance, or judgment is taken in by a mortgagee, to defend a subsequent incumbrance, he will be no farther or longer protected by it, than until he hath received so much of the profits as will satisfy the original security, on the extended value: for *then*, it will be avoidable by a *scire facias ad computandum*, or by an account to be taken in the Court of Chancery.

Judgment creditor cannot tack prior incumbrance to his debt, for he has no right to land, but merely a lien (o).

Here we must observe the distinction (*e*) between the preceding cases and cases where a judgment creditor, or creditor

(*d*) *Huntingdon v. Grenville*, 1 Vern. 52. *Supra*, 518.

(*e*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491. *Anon.* [Moseley, 50.] 2 Ves. 662. [nomine *Jackson v. Langford*, Belt's Supp. to Vesey, sen. 436. The placita of this case pointedly notices the above distinction. It is in these words:—A prior mortgagee may tack a subsequent judgment; but a prior judgment creditor obtaining a

subsequent mortgage cannot. A prior mortgagee, however, cannot tack a bond debt against the mortgagor, his assignee of the equity of redemption, or creditors, though he may as against the mortgagor's heir, to prevent a circuit. A similar distinction is made in Moseley, page 50.—Ed.] See vide *Wright v. Pilling*, Gilb. Eq. Rep. 151. S. C. Pre. Ch. 494. [which is disposed of in the note, post, p. 521.—Ed.]

payment of his principal and interest, should be charged with the balance and interest. As to the account, of a mortgagee in possession, see post, vol. ii. Chap. XIV.

Judgment creditor cannot tack, when.

(O) This doctrine has been fully acknowledged by Lord Eldon, in *Kest Is parte*, 11 Ves. 617. His Lordship there observed, that a mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land. He has neither *jus in re* nor *jus ad rem*. But if there is once a creditor by mortgage, and he afterwards advances money upon a judgment,

by statute or recognisance, buys in a first mortgage; for he cannot tack or unite this to his judgment, &c. so as to gain a

the court will intend that he makes that advance, meaning to take a security upon the land for both; and he may tack: but if he remains a mere judgment creditor, the court says he does not deal upon the faith of the land; in this sense, that he does not contract for an interest in the land; and therefore is entitled only as a judgment creditor to an *elegit*; and he cannot tack.

So likewise in a later case (*Lewes v. Morgan*, 5 Price, 42. 153), it was held that a subsequent judgment creditor could not tack his judgment debt to a prior mortgage, though he were in possession of the estate. The facts of that case are very numerous and complicated; but it appears that the attorney of the mortgagor had several judgments against him for costs and other considerations, and also a mortgage and other securities for other debts. The attorney then contrived to obtain possession of the estate as receiver, under an order of the court of Exchequer, and received the rents and profits till it was stated he was paid his mortgage over and over again. The mortgagor seeking to have the possession of the premises re-delivered to him, the attorney as mortgagee set up his judgments, and contended that he was entitled to tack these to his mortgage; but the court held otherwise. The argument was, that the court could not take the estates from the defendant, because he was in possession under his judgments, which it was contended were tackable to the mortgage by virtue of his possession. But that, said Baron Graham, was not true; for the defendant was in truth in possession in the character of receiver. Then, continued the learned Baron, it was said that as it was a mere term, he was entitled to keep possession on the ground of his general lien. But it would be absurd to hold that a formal fiction, adopted in conveyancing for technical purposes, should be so construed as to work such an injustice. The term was enacted for a particular purpose; and after his receivership should be at an end, there would also be an end of his term. It was unintelligible how he got into possession; but being in, he could not enforce his *elegit* against his own possession. As soon as the mortgages were discharged, his receivership was gone. The argument of his having been appointed receiver by this court was, if possible, more meagre still. The pressure of distress compelled the mortgagor to submit to that appointment; and when the last receiver broke and run away, Morgan, the present receiver (who was also the attorney and judgment creditor) availed himself of the occasion to enter again into the receipt of the rents and profits, in which he continued ever since. If the judgment for 114*l.* be investigated, how was it obtained? It was founded on the alleged balance of accounts. But that account had been broken up; and how that settled account, as it was called, could have blinded any man of common sense for a moment was perfectly astonishing. That settlement was also one of the advantages which were taken of the plaintiff's distress. As to the *elegit* set up, it was quite absurd; for Morgan was himself in possession at that time as receiver. It was also contended, said Baron Graham, that the judgments were tackable to the mortgages; but that could not be, because *they were obtained in a different character from that of mortgagee*. The defendant was in possession as agent

Judgment not tackable if obtained in different character from mortgagee.

Release of right
not a release of
lien.

preference thereby, because such creditor cannot be called a purchaser, nor hath he any right to the land; he hath neither *jus in re* nor *ad rem* (P); and therefore, though he release all his right to the land, he may extend it afterwards. All that he hath by the judgment is a lien upon the land; but it is not certain whether he ever will make use thereof; for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment creditor doth not lend his money upon the immediate

to the trustees merely; and they had nothing to do with the judgments. Had they indeed been obtained in the same character, there might have been something in it; but, in this case, that was clearly not so.

But mortgagee
may tack prior
judgment to his
mortgage.

It should, however, be remembered, that if a mortgagee buy in a prior statute or judgment (holding both in the same right, *Morrett v. Paske*, 2 Atk. 53. *Stanton v. Sadler*, 2 Vern. 30), he will be allowed to unite the judgment or statute to his mortgage; for the land was in the view and contemplation of the lender, *Higgon v. Syddal*, 1 Ch. Ca. 149; and the judgment creditor, by virtue of an *elegit*, might have brought an ejectment, and held upon the extended value; and as he had the legal interest in the estate, the court would not take it from him: and this whether the judgment or statute were paid off or not. *Anon.* 2 Ch. Ca. 208. The prior judgment or statute, however, will be of little use to the mortgagee, unless it confer a right to the legal estate; and a mortgagee buying in a subsequent judgment without the consent of the mortgagor, cannot, as against a mesne mortgagee or assignee of the equity of redemption, tack this judgment to his mortgage. *Post*, 527.

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Lord Macclesfield's opinion
in *Wright v. Pilling* over-ruled.

A judgment creditor therefore does not in equity stand on the same footing as a mortgagee or purchaser. In *Wright v. Pilling*, ante, 519 a, n. (e), it was made a question, whether a judgment creditor might not as well secure himself by buying in a prior incumbrance, as a third mortgagee might by taking an assignment of the first mortgage; and on Mr. Vernon's making the declaration above alluded to, Lord Chancellor Macclesfield and several at the bar seemed not to agree to it, but thought a judgment creditor might as well secure himself by taking in a prior mortgage as the third mortgagee; for that his judgment was a lien on the land: and when he got in a prior mortgage, that ought not to be taken from him till payment of his whole debt. This *obiter* opinion of Lord Macclesfield has never been attended to; and it may now be considered as fully over-ruled by the subsequent case of *Brace v. Marlborough*, ubi supra; and the point as stated by the learned author is uniformly acknowledged as the settled doctrine of the court by all the equity text writers. See 2 Fonb. Treas. Eq. 302, 5th edit. But a judgment creditor, it must be remembered, may redeem a precedent mortgage, though he acquire no benefit thereby. *Bacon v. Ashby*, Finch, 368.

(P) And after execution sued, he has but a mere chattel interest in the land extended, and no freehold.

view or contemplation of the conusor's real estate; for lands afterwards purchased may be extended upon the judgment; nor is he deceived or defrauded, although the conusor of the judgment hath before mortgaged his real estate, as is the case of a mortgagee, if the mortgagor hath before mortgaged his land to another.

Lands purchased after judgment, may be extended.

Thus, where B. made a mortgage of his estate (f), and afterwards became indebted to H. in 60%. and then conveyed to S., in trust, in the first place, to pay a debt due to himself, and subjected thereto all B.'s other debts in average; then S. tendered the money to the mortgagee, which the mortgagee refused, and afterwards he assigned the mortgage to H.; then H. obtained judgment against B. on his bond for the 60%, after which S. sold to the plaintiffs, who, not having paid their purchase-money, preferred their bill against the mortgagees and H. to redeem; and it was decreed that the plaintiffs should redeem H.'s mortgage, and that the judgment should be paid but in proportion; for though H. had a title at law, and it was insisted that this judgment would affect the resulting equity in B., if there was more than sufficient to pay his debts, yet the conveyance made for the payment of debts, being a good conveyance, and prior to the judgment, *that*, being subsequent, could not affect the estate.

Creditor (obtaining judgment after conveyance to pay debts), paid in average only, though he had an assignment of prior mortgage.

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So, where A. mortgaged his estate to B. (g), and then assigned the equity of redemption to C.; afterwards D. obtained a judgment against A., and procured an assignment of B.'s mortgage; then C. tendered the money due on the first mortgage to D., who had notice of the assignment of the equity of redemption, at the time of his purchasing in the first mortgage. It was objected, that D., having the legal estate in him by the assignment of the forfeited mortgage, and C. having only an equitable interest, not supported by the legal estate, he ought to pay both monies to D.; but the court resolved that C. should redeem, paying only the money due on the mortgage.

Judgment creditor buying in first mortgage not preferred to second mortgagee as to his judgment debt.

(f) *Stephenson v. Hayward*, Pre. Ch. Rob. on Fraud. Conv. 355.—Ed.]
 310. [Vide etiam *Langton v. Tracey*, (g) *Breerton v. Jones*, 1 Eq. Ca. Abr.
 3 Ch. Rep. 16, pl. 30, 2d edit. and 323, pl. 10. [S. C. post, 527 a.—Ed.]

Person lending money on notes purchasing first mortgage preferred to second.

There is indeed a case (*h*), in which the court may be thought to have infringed upon this rule, which was, where A. the plaintiff, had lent money on several notes of different dates, each of them in words to this effect: "Received of A. — £ to be secured on mortgage of my Stokehall estate;" and the drawer had, previously to his drawing these notes, made a mortgage of his estate to the defendant. A., to cover the sums lent on the notes, bought in a mortgage which was made prior to the defendant's: and Lord Hardwicke was of opinion, that A. should thereby protect himself against the defendant's mortgage; and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the first mortgage.

Because drawer of notes agreed to secure money on mortgage (Q).

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But it appears to me that this case is clearly distinguishable from the common one of a creditor by judgment, or statute, purchasing in a prior incumbrance to protect himself, which, as hath been said, he will not be permitted to do; for these memorandums seem to fall, more properly, under the description of agreements for securing the money lent by mortgage, than of notes for the payment thereof; and consequently, the court, considering *that* as done, which, upon a bill to compel a specific performance of these agreements, they would have directed to *be* done, looked upon this case as not distinguishable from the ordinary case of a *puiſne* mortgagee purchasing in a prior incumbrance to protect himself (*i*).

Statute extended may protect conusee as to

So a statute extended may, notwithstanding this rule, be made use of to protect the conusee, as to a farther sum lent

(*h*) *Matthew v. Cartwright*, 2 Atk. 347; et vide *Bayley v. Robson*, Pre. Ch. 89. *Coleman v. Winch*, *ibid.* 511, et *supra*, 350. 359.

(*i*) Vide *Ex parte Willis*, 1 Ves. jun. 162, et *supra*.

No tacking allowed to simple contract creditors.

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(Q) This was a clear case of equitable mortgage; and although it may on a first impression appear to support the proposition, that simple contract creditors may buy in a prior mortgage and tack the debt to the security; yet, when it is considered, that a judgment creditor will not be allowed to protect himself under the doctrine of tacking by purchasing in a prior mortgage, it certainly seems to follow, that a simple contract creditor cannot be in a better situation by such a purchase; and this may be laid down as good law, supported by the case of *Newby v. Cooper*, Finch, 379; et vide *ante*, 351, n. (K).

by him, against a mortgage, or security, taken by a *mesne* incumbrancer; for, the conusee being entitled, at law, to hold the estate until he be satisfied his original debt at the extended value, the court will not interpose to take it from him, when he hath a further demand; for *that* gives him an equity to retain it against the *mesne* mortgagee, which the latter cannot over-reach, but on gaining a greater equity to himself by discharging both debts. Thus where a man acknowledged a statute (*k*) in the penal sum of 1500*l.* for payment of 800*l.* with interest; and then, it being forfeited, and the lands extended thereupon at a certain annual value, settled the same lands in tail, for a good and valuable consideration; afterwards he borrowed more money of the conusee, articles having been first drawn between them, whereby it was agreed, that the statute and extent should stand as a security for the farther sum borrowed. The conusor being dead, and the principal sum of 800*l.* with interest, satisfied by perception of profits or otherwise, the plaintiff, tenant in tail under the settlement, filed his bill to account at the real value; but it was held by Chief Baron Hale, and all the court, that no relief could be given against the penalty of the statute, the equity being equal, and the law on the side of the defendant.

further sums advanced after mortgage taken by mesne incumbrancer.

A prior mortgage purchased in, will be no protection to a *puisne* mortgagee, unless it be forfeited (*l*); for until then, the estate remains as it was at common law, redeemable upon performance of the condition stipulated.

Prior mortgage no protection to puisne mortgagee, unless it be forfeited.

And a *puisne* mortgagee (*m*), who purchaseth in a prior security to protect his *own* (*R*), shall not only hold it until he be

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Puisne mortgagee buying in prior secu.

(*k*) *Sir John Hedworth v. Josias Pri- ment, see pages 551, 2, infra, and note mate, Hardr. 318.* there.—*Ed.*]

(*l*) *Hitchcock v. Sedgwick, 2 Vern. 156.* [*Affirmed on appeal in parlia-* (*m*) *Darcy v. Hall, 1 Vern. 49.*]

(*R*) That is, a *puisne* mortgagee, who has purchased in a prior security, to protect a subsequent mortgage which he holds in his own right, as distinguished from a subsequent mortgage which he holds for the benefit of another as agent, trustee, guardian, heir at law, or executor, and this distinction it will be well to remember.

rity, paid all due on that security as well as on his own.

paid his debt, and reimbursed the money advanced by him to purchase it; but until he hath received all the money and arrears of interest, due on the security bought in, as well as upon his own.

Mortgagee having legal estate, may tack further sum advanced to his security, if he have no notice of mesne incumbrance (s).

And, as a *puisne* mortgagee may tack a prior incumbrance, that brings with it the legal estate, to his own, and thereby protect himself against intervening charges thereon (n); so, a mortgagee *eigne*, having the legal estate, may tack a subsequent sum advanced by him upon the former security, to his prior mortgage, and thereby protect himself against *mesne* (t)

(n) *Goddard v. Complin*, 1 Ch. Ca. 119.

Simple contract debt not tackable to mortgage, though accompanied with parol agreement that it should be so.

(S) This was stated to be a known rule in equity by Lord King, in *Bedford v. Backhouse*, Kel. Rep. 6, cited also post, vol. ii. 634. As to future advances it is observable, that simple contract debts are not tackable to a mortgage, either in themselves as simple contract debts, or by means of a parol agreement that the mortgage shall become a security for such debt. This was decided by Lord Eldon, in *Hooper Ex parte*, 1 Meriv. 7. The single point before the court in that case was, whether or not the petitioners were entitled to tack a simple contract debt of 400*l.* to their mortgage security, on proof of a parol agreement that the same should be tacked to the original mortgage. Lord Eldon decided in the negative; observing, that the mortgagee was not entitled to say he held the mortgage as a deposit, because the contract under which he held was a contract for conveyance only, and not for deposit. The subsequent memorandum in writing created nothing more than a debt by simple contract, and could not be added to by parol. Thereupon his Lordship dismissed the petition, with liberty to file a bill.—It is barely necessary to notice the difference between a simple contract debt and a debt by judgment, to perceive the ground on which the case was decided. A judgment is a species of security, and is a general lien on the land; but a simple contract debt involves no other relation than that of debtor and creditor. S. L. ante, 351, n. (K).

Illustration of terms—Tacking not allowed between equitable incumbrancers.

(T) It may not be amiss to explain these technical terms. If there be four mortgages, A., B., C., and D., A. will be the *eigne* mortgage; B., C., and D., will be *puisne* mortgages; and B. and C. *mesne* mortgages. But the words *eigne*, *mesne*, and *puisne*, are meant to express the situation of the first, second, and third mortgagees, or incumbrancers. Therefore as between B., C., and D., B. will be *eigne* mortgagee; and as between C. and D., and an intervening incumbrancer, C. will be the *eigne* mortgagee; the intervening charge will constitute the *mesne* incumbrance, and D. will be the *puisne* mortgagee. But it should be remembered, that to enable a mortgagee to benefit himself by the doctrine of tacking, either his own mortgage or the one he buys in should confer a title to the legal estate; consequently with regard to tacking, the word *eigne* must designate the *first* mortgage or incumbrance, and not the *eigne* mortgage by relation, see ante, 451, 446. et infra, 558.

incumbrances. Thus, where A. had an annuity charged on the manor of S., and B. an estate therein liable to the annuity, and C. an interest subsequent to both by mortgage (o); B. having no notice of C.'s interest, treated with him in the reversion in fee, who desired to borrow money of him, and thereupon purchased A.'s interest, and for that, and by way of money lent to the reversioner, paid 900*l.*, but there was no more than 500*l.* due to A.; C. exhibited his bill against A. and B. to redeem them on payment of their debts; and the question was, whether C. should pay B. any more than the mortgage-money he had originally lent, and the 500*l.* paid by him which was due to A.? And it was decreed, that he should pay the whole 900*l.* advanced.

So, if there be first and second mortgagee (p), and the first lend money after the last mortgage made (u), taking a judgment as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he hath the legal estate and the judgment, *which*, though it passeth no interest, presently, in the land, operates as a *lien* (w). First mortgagee may tack a judgment to his mortgage, though subsequent to a second, of which he had no notice.

(o) *Blackston v. Moreland*, 2 Ch. 4th resolution in *Brace v. Duchess of Marlborough*, 2 P. Wms. 494. 2 Ves. Ca. 20.

(p) *Shepherd v. Titley*, 2 Atk. 352. 662. Et supra.

(U) Without notice of the second mortgage at the time of such subsequent advance. Pre. Ch. 226.

(W) Lord Chancellor Freeman puts a similar case, 2 Freem. 7. Sir William Grant carried the doctrine a step further, and decreed, that when circumstances arose in which the doctrine of tacking took place, the judgment or statute tacked to the preceding mortgage became as much part of the mortgage as the sum originally lent, and was to be considered as equally secured thereby. The case in which his Honor pronounced this opinion was that of *Baker v. Harris*, 16 Ves. 397, where there was a mortgage, and afterwards a judgment entered up by the mortgagee for a further sum and docketed, and then a second mortgage; the mortgagor becoming bankrupt, the second mortgagee filed his bill against his first mortgagee, and against the bankrupt and his assignees, praying that he might redeem the first mortgage on payment of what was due on that mortgage only; that the assignees might be foreclosed or a sale be directed; and that the deficiency, if any, might be proved. The first mortgagee insisted that he had a right to tack the judgment to his mortgage, and that he was entitled to be paid both his debt by mortgage and judgment in preference to the second mortgagee. Sir William Grant Debt tacked to mortgage becomes part thereof.

Further sum advanced must be to one having right to charge estate.

But the farther sum advanced must be to one who has a right to charge the estate in question (*q*). Therefore where I. C., the grand-father of C. made a mortgage of lands in fee to H., and then having two sons, A. and B., devised the equity of redemption to his youngest son B., and his heirs,

(*q*) *Cooper v. Cooper*, Nels. Rep. 153.

Master of the Rolls.—“My opinion continues clearly that the subsequent bankruptcy cannot in any degree affect the [first] mortgagee, who, before the bankruptcy, had a complete lien upon the land, as well for the judgment as the mortgage debt. The statute relates only to judgments that continue merely such at the time of the bankruptcy, not to those which have acquired all the effect of an actual mortgage, as is the case of a judgment obtained by a party having an antecedent mortgage.”

Mr. Christian's observations in derogation of Baker v. Harris, considered untenable.

Mr. Christian cannot think that a judgment united with a mortgage, was ever intended to be treated as a mortgage against the general creditors where the debtor becomes bankrupt; and he founds this opinion on the following consideration, which is an entire misapprehension of the law:—“If A. has a judgment, he must have a dividend only; if B. has a mortgage, he must be paid in full, if the estate is of sufficient value. I cannot think then that the legislature intended that A. was also to be paid in full out of the premises, if he got an assignment of B.'s mortgage.” 2 Christian's Bankrupt Laws, 112, 2d edit. This shews Mr. Christian's opinion to be, that a judgment creditor can, by buying in a mortgage, tack his judgment debt to the mortgage, and thereby obtain satisfaction in full for both demands. But, we have seen, ante, 519, notes (*e*) and (*O*), that a judgment creditor, buying in a mortgage (whether that mortgage be executed before or after his judgment) cannot tack his judgment to the mortgage; consequently the legislature did never intend, for such is not the law, that A. procuring an assignment of B.'s mortgage, should be paid in full. So much therefore of Mr. Christian's argument, in derogation of the above judgment of Sir William Grant, as depends on this opinion, must be dismissed. The learned gentleman argues with more force, when he observes, that the legislature has expressly declared that a creditor by a judgment unexecuted shall have no preference to the prejudice of other creditors. But Sir William Grant took this into consideration in *Baker v. Harris*; and as that case was circumstanced, expressly ruled to the contrary. Mr. Christian's hint that his Honor's judgment in this case will, on a future investigation, be considerably qualified, if not over-ruled, is, it is conceived, entirely unfounded: for an act of bankruptcy ought not surely to undo rules which have been established for centuries, namely, that a prior mortgagee may tack a docketed judgment to his mortgage.

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Distinction on tacking as to redemption and foreclosure.

We may also here remind the student, that if money be lent, and afterwards on a farther advance a mortgage be made to secure the same, neither the mortgagor (2 Ch. Rep. 247,) nor his heir, after his death, (1 P. Wms. 776,) can redeem without paying all the money due, 2 Ch. Rep. 247. And though the mortgage be obtained by assignment, the mortgagor cannot redeem with-

and died; B. entered into the mortgaged lands, and enjoyed the same two years, and then died, leaving a son an infant. After B.'s death, his elder brother A. entered on these lands, and having occasion for money, joined with the mortgagee in assignment of the mortgage to another person, of whom he borrowed a farther sum, and which the assignee advanced, having no notice of the will of I. C. Then the heir of B. came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the first mortgage. And on his part it was insisted, that the assignee could be in no better condition than the mortgagee, and that if there had been twenty assignments for more money, if the mortgagor or he who legally represented him had not joined, he should not be barred, but ought to be relieved. On the other side it was contended, that the assignee was a purchaser for a valuable consideration without notice of this incumbrance by the will, and that he had a good title, having taken an assignment from the mortgagee, wherein the visible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal sum and interest. But the court was of opinion, and decreed that the heir should be let into the equity of redemption upon the foot of the first mortgage.

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And where A. had a prior judgment, and a mortgage likewise on the estate of B. (r); and a subsequent judgment creditor, but prior in time to the mortgage, brought a bill in chancery, praying a sale of the mortgagor's estate, who was likewise willing and desirous to sell; *per curiam*, here A. is not a subsequent incumbrancer buying in a prior, but is the first of the incumbrancers, who advanced more money on a second incumbrance. Where the *first incumbrancer* by judgment has likewise a mortgage upon the estate, notwithstanding there is

First incumbrancer by judgment having a mortgage without notice of same judgment, no sale in favor of second judgment creditor, unless he will pay off first judgment and mortgage,

(r) *Smithson v. Thompson*, 1 Atk. 520.

out paying the money lent to him previously by the assignee, 2 Ch. Rep. 360. A distinction, therefore, is apparent between a bill to redeem, and a bill to foreclose; for in the latter case, the mortgagee cannot insist on tacking his subsequent debt, as he may do on a bill for redemption. See note to *Coleman v. Winch*, 1 P. Wms. 776, and *Morret v. Paske*, 2 Atk. 53. *Archer v. Snatt*, 2 Stra. 1107. This latter distinction however, is far from settled, see *infra*, vol. ii. p. 1019.

PRIORITY OF INCUMBRANCES,

... to the mortgage, yet if the creditor upon ... of such judgment, the creditor upon ... not come into a court of equity, ... so mortgaged, without paying off ... both of the first judgment and the ... if the defendant should ... with a prior incumbrance in his favor, ... notice of a prior judgment would be.

... a first mortgage(s), purchase in a ... *without the consent of the mortgagor*, a ... of the equity of redemption, ... the money due on both securities, in ... of the mortgagee tended ... without the consent of the owner, ... of bettering his own security (w s).

... notice of the intervening ... leading more money upon a ... not be permitted to tack them ...

... a prior mortgage of certain lands, ... subsequent, lent a farther sum to ... C. alleged that K. had notice ... money lent: K., by his an- ... but evasively; and C. ... the leading the last money; ... notice positively, the court ... of the first money only.

Case v. Bond, Pre. Ch. 296.
[or vide S. L. infra, 552, 3.—Ed.]

... that the judgment is a *lien* on the ... consequence of the first ... purchase had been made— ... If the first mortgagee has no ... he purchased in the judgment, ... to his mortgage, on the ... a circuity of action.

And the law is the same in case of purchasing in prior securities, to protect subsequent incumbrances (u); it will not avail the purchaser, if he had notice of the same incumbrance, at the time he advanced his money on such subsequent security; for it is the purchasing, without notice, that gives him equal equity with the same incumbrances; and, if a man will purchase with notice of another's right, his giving a valuable consideration will not avail him; for he throws away his money voluntarily, and of his own free will.

Priority of prior security with notice of same incumbrance, of no avail (z).

It seems, however, that this rule respecting notice, admits of an exception, where a man first mortgages land by a defective conveyance, and afterwards to a second person, by an assurance that is good and effectual, with notice of the former's interest. In this case, the second shall prevail notwithstanding: because the legal title is, ab initio, in him, and equity will not interpose to wrest it from him, where both are equally upon a valuable consideration (v).

Second effectual mortgage will prevail against first defective one, though made with notice of such defective security.

(u) 1 Atk. 211. 2 Ch. Ca. 25. 3 Id. 222. and fully stated in, 2 At. 1, 129.
(v) 1 Atk. 211. 2 Ch. Ca. 25. 3 Id. 222. and fully stated in, 2 At. 1, 129.
(z) 1 Atk. 211. 2 Ch. Ca. 25. 3 Id. 222. and fully stated in, 2 At. 1, 129.

I think it is not necessary to say that the above rule is not applicable to the case of a man who first mortgages land by a defective conveyance, and afterwards to a second person, by an assurance that is good and effectual, with notice of the former's interest. In this case, the second shall prevail notwithstanding: because the legal title is, ab initio, in him, and equity will not interpose to wrest it from him, where both are equally upon a valuable consideration (v).

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Second effectual mortgage will prevail against first defective one, though made with notice of such defective security.

Second mortgage without notice, not affected by the mortgagor's non-possession.

(s).
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The following case seems to have been decided upon this ground; for unless the subsequent purchaser for a valuable consideration, who had a complete title in law, could be charged with fraud by *reason of notice*, there appears to be no pretence upon which the prior purchaser for a valuable consideration likewise, but whose title was defective, could apply for relief; because, as between two purchasers upon the like considerations, that which has the complete title in law must prevail (y). Richard Wiseman, son and heir apparent of Sir Richard Wiseman, intermarried with Winnifred Barrington, entitled to a portion of 4000*l.* and brought a bill against his wife's trustees; whereupon a decree was had to pay him his wife's fortune, upon making a competent settlement; or, upon failure thereof, the fortune to be invested in lands by the approbation of the Master. And, upon the Master's report, that no competent settlement could be made by Richard the son, it was, by choice of the parties, invested in lands of Sir Richard, the father, of equal value; part of which lands happened to be eight acres of copyhold, which in the settle-

(y) *Oswick v. Plumer*, Pasch. 1708. 3 Bac. Abr. 644. [Bac. Abr. tit. Mort. (E), s. 3.—Ed.]

sition advanced by him in the text, for the cases are not parallel. In the one, the question arises between two mortgagees; in the other, between a mortgagee and judgment creditor. But the paragraph altogether is liable to great objection, and must be denied to be law for the reasons assigned in the note to p. 531, post, to which the reader is referred. Mr. Fonblanque adds a query to this doctrine of *Burgh v. Francis*, on the ground, that the second mortgagee had notice of the former defective mortgage, and of the first mortgagee's equity. See Fonb. Tr. Eq. p. 38.

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First mortgagee in possession twenty years, no bar to second mortgagee, if he receive interest in the interim.

(Z) If, therefore, the mortgagor be out of possession upwards of 20 years, paying during that period, interest to the second mortgagee on his mortgage, the first mortgagee being in possession all that time without acknowledging a right to redeem in the mortgagor, such long possession by the first mortgagee will not affect the second mortgagee, if at the time he lent his money he had no notice of the first mortgage, though it will bar the mortgagor himself of his equity of redemption. See ante, 360, and 385, *in notis*.

Principle of *Oswick v. Plumer*.

The case of *Oswick v. Plumer*, is also reported in 2 Vern. 636. The principle of the case was, that A. covenanted to surrender lands to uses, which were enjoyed accordingly, but no surrender was made. Thirteen years after A. surrendered the same lands to B. for valuable consideration without notice of the covenant, and B. was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

ment, were limited and declared, apart from the freehold, to be to the use of the issue of the marriage in common form, and afterwards in fee to the son, with a covenant from Sir Richard to surrender the copyhold. The wife died without issue, and the son mortgaged both the copyhold and freehold together, for a valuable consideration, to Oswick and others, plaintiffs, but without any surrender. The son died, and the lands descended to Elizabeth, his sister, and heir at law; then the mortgagees foreclosed Elizabeth, by a decree of the court, and entered and took possession; to whom, being in possession, Elizabeth released and confirmed the estate in fee. Afterwards, Sir Richard, the father, having been out of possession of the premises from the time of the settlement, which was made thirteen years before, *surrendered the copyhold land to the defendant Plumer, for a valuable consideration*: Plumer was admitted, and brought his ejectment; and the mortgagees brought their bills to be relieved, which were dismissed by the Master of the Rolls, on solemn argument, with costs; for that the court would not supply the defect of a surrender, against a person that came in by title, upon surrender of the same premises; which decree was, on re-hearing, confirmed by Lord Cowper (A).

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(A) Who took this difference, that when there are two persons that have equal equity, there those that have the legal title shall prevail, because there is no equity to take from such person the title that he hath gained at law; as where A., B., and C., are three mortgagees, and C. purchases in the mortgage of A. to secure his own money *bonâ fide* lent; equity will never take from him the legal interest he hath gained; but if the contending parties in equity have not equal equity, then those that have the greatest equity shall prevail against the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage, with livery, equity will supply the defective conveyance against a subsequent judgment creditor; because the judgment creditor not relying on the land for his security, he hath not equal equity to have that land applied for the payment of his debt, as he that took it in mortgage; but in this case, where Plumer had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender; so that the legal interest was in him; the covenant to surrender, though prior, could not be set up against him who had no notice of it; but Oswick must pursue his remedy at law, for the breach of the covenant. 3 Bac. Abr. 645, 4th edit. fo.

*Continuation of
Lord Cowper's
judgment in
Oswick v.
Plumer.*

If A. mortgage to B. by a conveyance which is defective, and then C., with notice of B.'s defective mortgage, takes a second mortgage from A. by a conveyance which is good and effectual; C., the learned author conceives will be

*Second mort-
gagee without
notice of prior*

Defective mortgage enforced against subsequent judgment creditors, though not against subsequent mortgages.

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We must here remark a distinction that hath been taken between the preceding case, and cases where the subsequent creditors have demands, which, although they are liens upon, yet are not considered as specifically charging the lands (x); as equity will enforce a defective conveyance against claimants of the latter description; for, as they did not originally take the lands for their security, and come in under the very person that is obliged in conscience to make the defective security good, they are considered as standing in his place, and will therefore be postponed, until such defective security be satisfied.

Bill to supply defective mortgage and be relieved against judgments by heir of mortgagor, decreed accordingly.

This point was settled so early as Lord Keeper Bridgman's time, in the case of *Burgh v. Francis* (a), the decree in which cause was affirmed by Lord Chancellor Nottingham. There the ancestor made a defective mortgage in fee for 500*l.* it being made by way of feoffment without livery, and afterwards the heir confessed several judgments on bond-debts due from the ancestor. And the question was, whether the judgments ought

(z) *Burgh v. Francis*, 3 Bac. Abr. 279. Finch's Rep. 28. 643. 1 Eq. Ca. Abr. 320, 321, et (a) *Burgh v. Francis*, Finch's Rep. vide 2 P. Wms. 491. 1 P. Wms. 28. Nels. Rep. 183.

defective mortgage, preferred. Secus if with notice.

preferred, notwithstanding he has notice of A.'s prior equity previously to his advancing his money, because he has the complete title at law; see ante, p. 528, 529; and the learned author cites *Oxwith v. Plumer* for his authority. But that case, it will be perceived, does not bear him out; for Lord Cowper expressly remarks, towards the latter end of his judgment as above stated, that the second mortgagee had no notice of the first defective mortgage, and on that ground it is evident Lord Cowper founds the principal bearing of his decree. This circumstance must have escaped the learned author's observation; for otherwise he could not have argued himself into a belief that the second mortgagee had notice, when the report states clearly that he had not notice; and this supposition is the more probable, as that part of the report where this statement occurs, appears to have been overlooked by the learned author. The case of *Oxwith v. Plumer* is, therefore, an authority for this position; that if there be two mortgages, the first by an assurance which is defective, and the second by an assurance which is good and effectual; the latter shall prevail, provided the second mortgagee have no notice of the first defective mortgage at the time he advanced his money. But if he have notice, the equity between the parties will immediately become unequal; and then all the cases declare, that the first mortgagee having the most equity, shall be preferred.

to incumber the mortgaged premises until the mortgage be paid off? And Lord Nottingham determined that they ought not; for that the debt due upon mortgage did originally charge the land, which the debts by bond did not, till they were reduced into judgments; and although the mortgage was defective in point of law for want of livery, yet equity, which supplied that defect, did still charge the land, and it ought not to be in the power of the heir at law to charge it, by acknowledging judgments in prejudice to such equity; the rather because the mortgagor had covenanted for him and his heirs to make any farther assurance, so that when the land descended upon the heir charged with this mortgage, he was in the nature of a trustee for the mortgagee till the money was paid, and could not incumber it; and though the creditors had not any notice of this mortgage, yet they should be bound in this case; because they were not put in a worse condition than they ought to be, namely, to be postponed to the mortgage (B).

Upon this principle, in a case where A. surrendered his copyhold, by way of mortgage for money lent, and the surrender was not presented at the next court, according to the custom of the manor (b); and then A. became a bankrupt, and the assignees were admitted, and brought their ejectment; and the surrenderee of the copyhold brought his bill in equity

Defective surrender supplied in favor of mortgagee against assignees of bankrupt mortgagor.

(b) *Taylor v. Wheeler*, 2 Vern. 564. Wms. 280. Et vide *Pye v. Daubuz*, 2 Salk. 449. 3 Bac. Abr. 644. 1 P. 3 Bro. C. C. 593.

(B) The general rule in cases of this description is, that a court of equity will not interpose in prejudice of a defendant having a legal interest for a valuable consideration and without notice of the plaintiff's equity. It is, therefore, very questionable, whether this case of *Burgh v. Francis* can be considered an authority for the general doctrine, that equity will, in every case, postpone a judgment creditor to a prior defective mortgage.—Mr. Fonblanque, after quoting *Burgh v. Francis*, and *Fitch v. Winchelsea*, 1 P. Wms. 279, adds, “But *quære*, whether in these cases, the subsequent incumbrancer had not notice of the former.” In *Burgh v. Francis* it is stated, that the creditors had no notice of the prior defective mortgage. But though this be the case, the learned gentleman's *quære* is not, it is conceived, on other grounds, misplaced; for if a mortgagee has been so negligent as to take a defective mortgage, he does not appear entitled to much favor in a court of equity, to the prejudice of an honest creditor.

Whether Burgh v. Francis supports rule generally deduced from it?

to be relieved, Lord Cowper granted a perpetual injunction in behalf of the surrenderee; and, although it was urged that the creditors of the bankruptcy were equally upon valuable considerations, as the surrenderee, and, having the title at law, ought to be preferred, yet that argument was overruled; because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; and therefore, where such creditors came, *under* the bankrupt, to charge the lands, they ought to stand in his place, and come under the same obligation of conscience to make good the defective security (c).

Because mortgagee had superior equity.

And the reason of this difference is, that where there are two persons that have equal equity (as was the case in *Oswick v. Plumer*, both being equally purchasers of the same property for a valuable consideration) there, those that have the legal title shall prevail, because there is no equity, to take from such person the title that he hath gained at law; but, if the contending parties in equity have not equal equity (as was the case in *Burgh v. Francis*, and *Taylor v. Wheeler*, because the one creditor had intended to secure himself by the mortgage

Observation on decree in Taylor v. Wheeler.

Assignees take, subject to same equities as bankrupt.

General rule as to relief on defective mortgage.

(C) Lord Cowper observed, that the mortgagor was plainly bound in equity by the defective conveyance, "*et come moy semble*, he became a trustee for the mortgagee;" and on the ground of numerous cases proceeding on the principle, that where there is a defective conveyance, relief shall be given against the party, his assignees, and representatives; his Lordship made the decree stated in the text, and directed the assignees to pay the plaintiff his principal, interest, and costs, or to be foreclosed (2 Salk. 449); and his Lordship made a similar decision in *Jennings v. Moore*, cited post, vol. ii. 594, 5. So in a modern case where a tenant in tail made a mortgage with a covenant for further assurance, and then became bankrupt, his assignees were held bound by the covenant. The Master of the Rolls declaring, that the assignees took subject to whatever equity the estate was liable to as against the bankrupt himself, *Mitford v. Mitford*, 9 Ves. 100, cited also ante, 193 a. note (8).

The general rule is, that if a mortgagee take a defective mortgage, equity will compel the mortgagor and his heirs, and all other persons claiming under him by act of law as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration if with notice, to make good the mortgage; *Jaques v. Huntley*, 1 Ch. Rep. 5. 10. 2d edit. cited; *Morse v. Faulkner*, 1 Anstr. 11; and see 2 Ves. jun. 151. 6 *ibid.* 745, and *Herbert, Ex parte*, 13 *ibid.* 188, where Lord Erskine said, the proposition that the assignees take subject to all the equities under which the bankrupt stood

of the copyhold, whereas the other creditors had trusted merely to the bankrupt's personal security, and, consequently, had not equal equity to have the land applied for the payment of their debts, as the former, who looked to that in particular) those that have the greatest equity, shall be relieved against the legal title (D).

Also, if a clause be contained in the first mortgage-deed, making it a security for farther sums borrowed, subsequent loans will have relation to, and be taken as part of, the original

Mortgage for securing all further advances. Second mortgagee with

was unquestionable. The doctrine, however, that the assignees stand just in the same situation as the bankrupt, and not in a better, and consequently that the same language may be addressed to the assignees as to the bankrupt, is not exactly reconcileable with many passages to be found in the reports; for in many books it is contended, that after bankruptcy, or a conveyance for the benefit of creditors in general, the assignees are to be considered as purchasers for the creditors, and their rights as standing on the same principle as if the debtor had not become a bankrupt, but had made a conveyance in trust for the payment of creditors, and see 11 Ves. 620. But the doctrine is now permanently settled, that a defective conveyance will be made good against not only the party himself, but also against his assignees or representatives, and all claiming derivatively under him. See *Brown v. Heathcote*, 1 Atk. 162. *Cripps v. Jee*, 4 Brp. C. C. 472. *Morse v. Faulkner*, 1 Anstr. 14. *Barker v. Hill*, 2 Ch. Rep. 113. 218, 2d edit. *Bradley v. Bradley*, 2 Vern. 163. *Reid v. Shergold*, 10 Ves. 370. 2 Freem. 257. *Fothergill v. Fothergill*, ibid. 256. *Pollard v. Greenvil*, 1 Ch. Ca. 10. S. C. 1 Ch. Rep. 98. 184. 2d edit. *Wilkes v. Holmes*, 9 Mod. 485. *Ithell v. Beane*, 1 Ves. 215. *Bixby v. Eley*, 2 Bro. C. C. 325. S. C. 2 Dick. 698. 17 Ves. 297. The ground of these decisions is, that the instrument being only inchoate and incomplete to pass the property, it is in equity evidence of an agreement to convey, and thereby the conscience becomes bound to make further assurance; that obligation arising from the payment of the money, per Lord Eldon, in *Mestaer v. Gillespie*, 11 Ves. 625.

(D) The general rules to be collected from this class of cases are, 1st. That a defective mortgage will be held good against the tenant in fee and his representatives, even if no covenant for further assurance be inserted in the mortgage deed, and this on the general equity between the parties. 2d. That if there be two mortgages, the first defective for want of livery, enrolment, registration, or the like informality, and the second good and effectual, the latter will be preferred if no notice of the first mortgage can be proved on the second mortgagee, but if such notice can be proved on the second mortgagee, then the mortgagee who has the defective security will be preferred. 3d. That if there be a defective mortgage, and afterwards a judgment or other security amounting to a general lien only on the estate, the creditor whose debt is secured or intended to be secured by such prior defective mortgage, will be preferred to the creditor having a general lien merely. But if the latter species of incumbrancer have no notice of the prior defective mortgage, doubts have

Result of cases as to defective mortgages,

notice, postponed to future advances made with notice of second mortgagor.

transaction; and they must be paid before a second mortgage intervening, although the first mortgagee had notice of it at the time of advancing more money, *if* the second mortgagee had notice of the clause in the first mortgage. Thus, where A. mortgaged his estates to B. for a term of years, to secure a sum of money already lent to A., and also all such other sums as should thereafter be lent or advanced to him, A. made a second mortgage to C. for a certain sum, *with notice of the first mortgage*, and then the first mortgagee, *having notice of the second mortgage*, lent a farther sum. Lord Cowper decreed that the second mortgagee should not redeem the first mortgagee, without paying as well the money lent after, as

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been entertained whether, on sound principles of equity, the case can be supported, which sanctions the conclusion that such incumbrancer would then be postponed to the mortgagee; and lastly, That a subsequent mortgage, without notice, will have preference both at law and in equity to the defective assurance, whether taken from a tenant in fee or any other person.

and mortgages by tenants in tail.

As to mortgages by tenant in tail, see ante, 190, *et seq.* whence it should appear, that if a mortgage be made by a tenant in tail, without fine or recovery, and he afterwards levies a fine or suffers a recovery, though to different uses, he will let in the mortgage or other incumbrance. Et vide *Dee v. Wichelo*, 8 T. R. 214. *Stapilton v. Stapilton*, 1 Atk. 8. Poph. 5. 6. But if he become bankrupt before perfecting the assurance, then, according to the case of *Beck v. Welsh*, 1 Wils. 276, (ante, 191), the assurance will at law cease at his death. But the soundness of that decision has been successfully questioned by the learned author. See ante, *ubi supra*. If a tenant in tail make a mortgage without fine or recovery, he may be compelled by bill in equity to perfect the assurance. The court however will not point out *what title* the mortgagor shall make; it will decree him to make such a title as he is capable of doing; but the issue in tail will not be decreed to perform the contract of their ancestor, *Stapilton v. Stapilton*, *supra*. If a tenant in tail make a mortgage by recovery which is defective, it is generally considered necessary that the tenant to the principle of the first recovery should join in the conveyance of the freehold to the tenant of the second recovery (*Mor. & Co. W. E.* 108), but that doctrine has been doubted, and it seems clear, that if the tenant in tail make an entry on the property previously to suffering the second recovery, such entry (supposing the tenant to the defective recovery to have been made by an innocent conveyance) will re-vest the seisin, and render the concurrence of the former tenant unnecessary. *Cov. Rec.* 68. If a tenant in tail become bankrupt before perfecting the mortgage security, and there is a covenant for further assurance in the mortgage deed, a court of equity, we have seen, will hold the assignees bound to make good the defective security, and will decree them to redeem or be foreclosed, and to convey to the mortgagee; see ante, 194, note (T). But without a covenant for further assurance

that lent before the second mortgage was made (c); for it was the folly of the second mortgagee, *with notice*, to take such security (E).

But, here we must particularly attend to the distinction between notice previous to the time of the lending the money by the *puisne* mortgagee, and at the time of purchasing in the elder incumbrance (d); for a *puisne* mortgagee will be protected, although he had actual notice of a second incumbrance at the time of purchasing in the *prior security* to cover his own, because that is the very occasion that shows the necessity of so doing.

Notice at time of buying elder incumbrance not material.

(c) *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3. [S. C. 2 Eq. Ca. Abr. 598. 574. —Ed.] (d) 1 Vern. 188. 2 Vent. 339. 2 Ves.

it is considered doubtful whether a court of equity will (as against the assignees) relieve a mortgagee, who takes a defective assurance from a tenant in tail. It may be added, that the mortgage of a tenant in tail without fine or recovery is not absolutely void, as it was once held (*Tooke v. Glasscock*, 1 Saund. 260) but voidable merely, determinable by the entry of the issue, *Machell v. Clarke*, 2 Ld. Raym. 778.

(E) The principle of this determination is in some degree questionable, for if a first mortgagee having notice of a second mortgage, cannot make a further charge so as to attach such future advances to his prior incumbrance as against the second mortgagee, because having notice of the *mesne* mortgage, he is as to such further advances deprived of his superior claim of law and equity, and can claim in equity only, where the rule is *qui prior est tempore potior est jure*, it should seem to follow that the effect of the general clause for annexing all further advances to the principle of the first mortgage would cease as to the second mortgagee, after notice has been given to the first mortgagee of the second incumbrance; at least there does not appear to be any well-founded reason for adopting a different rule between the cases, where a first mortgagee makes further advances with notice of a second incumbrance, and where he makes such further advances, with the like notice, under a clause in his mortgage deed stipulating that the estate shall be a security for all further sums borrowed. The only circumstance that supports the decision is, that the second mortgagee had notice of the first mortgage, and consequently on the principle that notice of a deed is notice of every thing contained in that deed, he had also notice of the clause that the estate should be a security for all further sums borrowed. And then having notice of that, Lord Cowper said it was his own folly to take a security at the risk of being over-reached by subsequent advances made by the first mortgagee to the full value of the estate. The same however may be said of the first mortgagee, viz. that it is at his peril

Observations on case in text.

Mortgagee not protected by taking conveyance from trustee with notice of trust, for he thereby becomes the trustee himself (F).

This rule, however, hath its exceptions (e); for, a purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee, if he hath notice of the trust *at the time of getting it in*. And therefore where B., being possessed of a term for years, had made a voluntary settlement thereof in trust for herself for life, remainder to I., her daughter, for life, remainder to the children of her daughter by her then husband; and I. afterwards mortgaged the lands in question to S., who pretended he had no notice of the settlement; I. being called in the mortgage-deed the daughter and heir of B., but that afterwards hearing of it, he got an assignment of the term from the trustees. The court resolved, that although a purchaser might buy in an incumbrance, or lay hold of any

(e) *Pye v. George*, Salk. 680. Ca. kins, 3 Atk. 560. 1 ibid. 475. [See temp. Talb. 260. *Saunders v. Deheir*, also on this subject, *Daniels v. Davidson*, 16 Ves. 249.—Ed.] 2 Vern. 271. Et vide *Shields v. At-*

to make further advances after notice of a subsequent incumbrance. The editor, in submitting these remarks to the consideration of the learned reader, desires to add, that individually he places but slender dependance in the force of their application.

Mortgagee having notice of trust conveying to one also having notice not exonerated.

(F) *S. L. Pearce v. Newlyn*, 3 Madd. Rep. 189. In the case of *Walley v. Walley*, 1 Vern. 484. S. C. 15 Vin. Abr. 452, an executor in trust for an infant residuary legatee, renewed a lease, part of the testator's personal estate in his own name, and then mortgaged the same to secure a debt of his own to one having notice of the trust. He afterwards assigned the equity of redemption to a trustee, in trust to sell for the payment of his own debts. The trustee sold the premises, and the mortgage was paid by the purchaser out of the purchase money, and an assignment was executed by the trustee and mortgagee to the purchaser. The purchaser had notice of the preceding circumstances before he paid his money, and the deed of assignment were executed. The court set aside the purchase, and decreed that the infant should be let into possession, and have the benefit of the new lease, and an assignment thereof from the defendants [namely, the executor, mortgagee, trustee, and purchaser], and an account of the profits for what each defendant had respectively received during the time the premises were in his possession; that the purchaser should be allowed what he had laid out in lasting improvements upon the premises for repairing, building, or necessary improvements, though such repairs and improvements were made pending the suit; that the trustee should deliver up to the purchaser the note or bill he gave for the payment of the residue of the purchase money, and that the purchaser should be left at liberty to bring his bill against the mortgagee for the money he paid to him on the assignment of the mortgage.

plank to defend himself, yet he should not be protected by taking a conveyance from a trustee, after he had notice of the trust; for, in that case, he himself *became the trustee*, and must not, to save himself, be guilty of a breach of trust.

Even a fine levied by a purchaser (f) for full consideration, *with notice of a trust*, to strengthen his estate, will not bind the *cestui que trust*, although there be five years non-claim; for he, having purchased with notice, is but a trustee, notwithstanding any consideration paid by him; and the estate not being displaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaser hath not notice (G).

Non-claim on fine by purchaser, with notice of trust, will not bar cestui que trust: secus, if no notice.

[536]

(f) Per Lord Keeper, in *Bovey v. 1 Atk. 475. [S. C. 1 Eq. Ca. Abr. 257, Smith, 1 Vern. 149. 2 Ch. Ca. 125. pl. 11. 384, pl. 3.—Ed.]*

(G) The same doctrine was stated and approved by Ventris and Twisden, Justices, in *Freeman v. Barnes*, and *Dighton v. Greentil*, 1 Vent. 82. 2 *ibid.* 329. and 1 Sid. 460. As to non-claim on a fine levied by the trustee, such, it seems, will bar the title of the *cestui que trust* at law, but equity will interfere, as in *Focus v. Salisbury*, Hardr. 400. Nearly all the decisions on this point have been in Chancery on bills to be relieved from the rigour of the common law; and see *Bowles v. Stewart*, 1 Sch. & Lef. 228. In *Kennedy v. Daly*, *ibid.* 379, it was held, that a fine and non-claim by a trustee to a person having notice of the trust, should not bar the *cestui que trust*. Lord Redesdale, in that case, went fully into the point, and concluded by observing, that the ground of the decision [in equity] that a fine and non-claim would not bar, was, that the fine was a mere conveyance, and if merely a conveyance to a person with notice of the trust, it did not alter the estate; it did no more than any other conveyance; it did not extinguish the trust, nor separate it from the lands. So if Mr. Daly (the trustee) had made a conveyance to another person with notice of the trust, and had taken back a re-conveyance, this would have operated nothing; it would not have altered the estate; nay, if a trustee conveyed to a person who had no notice of the trust, and had then taken back a re-conveyance to himself, he having notice of the trust, it would attach on him, though it would not on a person not having notice. If a third person had become a purchaser, he would have held, discharged of the trust.

Text confirmed:

And his Lordship referred to a manuscript case of *Baker v. Prichard*, from a note of Lord Hardwicke's, in his possession, where it was held, that a fine levied by a person in possession under articles, of a matter which was in dispute between two parties, should not operate till the dispute was determined between them. The person there was let into possession until the question of right could be determined; in the mean time he levied a fine; he seemed to have had no previous estate; the fine, therefore, operated to give him a degree of title which he had not before, yet it was held, that it should not operate to injure the parties who had let him into possession in confidence; and Lord

Person taking estate which is bound by a right, cannot, by levying fine, bar that right.

Denial of notice at time of purchase only, not enough.

And where the plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the trust was had, *and that at or before his taking the said conveyance*, he had notice of the said trust for the plaintiff(g); the defendant, by way of answer, denied that he had any notice of the trust *at the time of his purchase or contract*, and pleaded that he was a purchaser for a valuable consideration. And it was in-

(g) *More v. Mayhew*, 1 Ch. Ca. 34. Abr. 685, pl. 11. Et vide *Wigg v. Attorney-General v. Gower*, 2 Eq. Ca. Wigg, 1 Atk. 384.

Redesdale observed, that it was a general rule, that whoever came in under the possession of one whose legal right was bound by an equitable title, though he took by fine, he should be bound if he had notice.

Tenant cannot bar landlord by fine and non-claim.

In the case of *Lord Portsmouth v. Vincent*, (cited in *Lord Pomfret v. Windsor*, 2 Ves. 476.) tenants at will in possession under a letting by a receiver from the Court of Chancery, were, by the neglect of the parties in the cause suffered to remain in possession for a great number of years, and not called on for their rent; they levied fines, and insisted on them as a bar, but Lord Hardwicke said, "No, you gained that possession as tenants under the receiver of the court; you gained that possession, therefore, in confidence, and you shall not, by means of that possession, defeat the title of the persons for whom you had the possession;" and he would not suffer the fine and non-claim to be a bar.

Effect of fine in barring equities.

On the subject of this note Lord Nottingham has delivered his opinion as follows:—"A fine doth bar a trust or any other right in equity; for it is within the very words and meaning of the law, which concludes all persons as well privies as strangers who do not make their claim as the act directs; and the mischief were intolerable, if a right in equity should still subsist after a fine; for no man living could know when his inheritance was in peace. This point was never doubted since Lord Coventry's time, see *Thynne v. Cary*, W. Jones, 416. The differences are these; where a man has the right in equity in the land itself, and where he has right in equity as only against the person in respect of the land; in the first case a fine will bar—not in the latter. As in the case of *Kinnoul v. Grevil*, 1 Chan. Ca. 295, where the Earl of Carlisle having mortgaged the manor of Sowby to Tryon, for 1500*l.*, did by his will devise certain lands to trustees for payment of debts, and an annuity of 1000*l.* per annum, to the Earl of Kinnoul for life, out of the demesne of Waltham, and then devised the manor of Sowby to the Lady Manchester for life, remainder to Mr. Grevil. Now, though the manor of Sowby ought to have borne its load (the mortgage money due upon it being no part of those debts in the schedule with which the trustees were charged), yet such collusion was used, that the trustees were prevailed upon to pay off the mortgage upon Sowby, and then the rest of the lands not being sufficient to pay off the residue of the debts, part of the demesnes of Waltham were by the will to be sold to supply

sisted that the point of notice was not well answered, in that the defendant denied notice *at the time of the purchase only*; for the word *purchase* might be understood to mean the time when the contract for the purchase was made, and it might be, he had no notice then, and might have notice after, before, or at sealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was over-ruled (H).

the deficiency, and so the security of the Earl of Kinnoul's annuity would have been straitened; to prevent this, the Earl of Kinnoul exhibits his bill against Grevil, and prays that he may reimburse the 1500*l.* of which Sowby has been unjustly eased, that so no part of Waltham might be sold. Grevil pleads a settlement of the manor of Sowby by a fine, with proclamations, in bar of this bill, which was over-ruled; for the plaintiff's demand was not against the land at Sowby, but against the person of the defendant in respect of the land, and so the fine was not material. Another difference is, where the equity arises by the fine itself, and where it arises by some collateral agreement. If the equity arises by the fine itself, as if it be a fine upon a trust or mortgage, there this fine can never bar this equity; for that were absurd, that the same fine which creates the equity should bar it too. But if it arise by some collateral agreement, and be an equity against the land itself, there a fine and five years will bar this equity, unless it be saved by a due and reasonable claim; and this was ruled lately in the case of Gifford and Phillips, Mich. 27 Car. 2, where George Low, against whom a decree had passed for 8000*l.*, did by his will subject his land to the payment of his debts, in case the personal estate was not sufficient; the heir of George Low sold the land in 1649 to Sir Harbottle Grimstone, and he in 1653 to the defendants, by fine and recovery, and a bill being exhibited to have satisfaction of this money out of that land, the fine and non-claim were allowed to be a good plea in bar. Another difference is this; where the fine is obtained by fraud and practice, or is infected with notice, or any way criminal, such a fine and non-claim bar no man's pursuit. Otherwise it is of a fine and non-claim severed from these circumstances. As in the case of Bovey and Smith, 18th of December, 1676, where a trustee made a conveyance in breach of trust, and presently after retook the estate by fine; this being all one entire act, and a purchase with full notice, could not prevail against the *cestui que trust* by non-claim, for *dolus circuitu non tollitur*; but a fine innocently levied to a stranger had barred the *cestui que trust*." *Salisbury v. Bagott*, Ld. Nott. MSS. 2 Swanst. 610.

(H) But a denial of notice at the time of purchase, without adding "or contract," will, as a general rule, be sufficient, without saying "at any time before," as appears in p. 553, post. It may be material to apprise the student here, that notice is not confined to the time of the contract; for if a person who has a lien in equity on the premises, give notice of such equitable lien before actual payment of the purchase money, it will be sufficient. And

[537 *]
 Notice binding,
 if given before
 execution of
 deed, or pay-
 ment of money.

Trustees to preserve contingent remainders joining tenant in tail in making mortgage, not liable for a breach of trust.

But here we must observe, that if *cestui que trust*, tenant in tail (*h*), be the mortgagor, and join with the trustees in making the conveyance, it will be good and valid; they being considered as trustees purely for the tenant in tail to preserve his estate *only*, and not to stand in opposition to him, for the sake of those who are to come after him (*i*).

(*h*) *Elie v. Osborne*, 2 Vern. 754. 1 Eq. Ca. Abr. 385, pl. 3.

therefore where a man purchased an estate, paid part of the purchase money, and gave a bond to pay the residue, notice of an equitable incumbrance before payment of the money, though after the bond given, was held sufficient. *Tourville v. Nash*, 3 P. Wms. 307. So in *Storey v. Windsor*, 2 Atk. 630, Lord Hardwicke said, there was not a sufficient denial of notice, because it was not averred that the purchase money was paid before notice, but only that the purchaser had no notice at or before the time of the execution of the deeds. In like manner, in another case, his Lordship held, that a plea to a bill that money was paid, or *bonâ fide* secured to be paid, was not sufficient, as the money might, notwithstanding, never be paid. *Hardingham v. Nicholls*, 3 Atk. 304. A similar plea, however, is said to have been allowed in *Fitzgerald v. Burke*, 2 Atk. 397, which, it is conceived, is a mistake of the reporter, as Lord Hardwicke's whole judgment is against such a decision. In *Wigg v. Wigg*, ante, 536 a. n. (*g*), it was held, that though the purchaser might not have known of the incumbrance before he paid his money, yet, as he knew of it before the deed was executed, it affected him with notice; et vide further, *Redesd. Tr. Plead.* 223. 241, and post, vol. ii. 651, *et seq. in notis*.

In what cases trustees to preserve contingent remainders may join in destroying them.

(*i*) The language of the court on this point has assumed a different tenor since the decision referred to in the text, but as to that case, it does not appear that it would now receive a different determination; for there the father being tenant for ninety-nine years if he should so long live, with remainder to the trustees and their heirs during his life, to preserve contingent remainders, with remainder to his sons in tail; the son, who appears to have been of age, had a vested estate-tail in equity, and could have suffered an equitable recovery. On that ground, therefore, the case of *Elie v. Osborne*, ubi supra, may be supported. If the tenants in tail are under age, trustees for supporting contingent remainders, cannot, without the direction of a court of equity or an adequate indemnity, be advised to lend their assistance in suffering recoveries intended to destroy those very estates which they were appointed to preserve; nor can a mortgagee be advised to accept the title with notice of the minority. But when the tenant in tail has attained the age of twenty-one years, the trustees may join in suffering a recovery without hesitation. And it seems, that if the purposes for which they are required to join are fair and reasonable, such as they themselves would have acceded to on a settlement of their own property, they might safely join without its being deemed a breach of trust. And if the tenant in tail is in a situation to suffer a valid recovery, if he were seised of a legal estate, trustees to preserve contingent remainders may there assist him in the destruction of the contingent remainders, without its being

So, if the *eigne* incumbrance (i) be purchased in, after a decree *in rem*, by a creditor, party (κ) to that decree, it will not protect him, although he had not notice of any prior incumbrance at the time he lent his money, as, in this case, notice or not is immaterial; for the decree binds the purchaser, and the vendor can give no title, when the right to the land is adjudged to another, and the party who gained the suit, hath a title, by the decree, to carry it into execution on the land, into whose-ever hands it may afterwards come.

Decree to account, bar to tacking, if purchaser be party to suit.

Thus, in the case of *Wortley v. Birkhead* (k), where the plaintiff, (after a decree had been made in 1748, in a cause wherein the plaintiff and defendants, among other creditors, were plaintiffs, for the sale of the estate of A., whereby the Master had been directed to inquire into the priority of their demands) bought in a judgment given in 1694, and made claim before the Master, to have it tacked to his mortgage, and thereby to be paid before the defendant's; as to which the Master refused to make any report: whereupon the plaintiff filed his bill, and one question was, whether he could tack the

Third incumbrancer may, pending bill by second against first for redemption, buy in first incumbrance, and thereby gain priority. Sed secus, after decree to settle priorities (l).

(i) 2 Ves. 477. 2 Ch. Ca. 48.

vide S. L. *Dowse v. Rue*, 9 Mod. 38.

(k) *Wortley v. Birkhead*, 2 Ves. 571. 2 Com. Dig. Chan. (4 W. 28), pl. 717, S. C. 3 Atk. 809. 2 Vern. 525. [Et 8vo. edit.—Ed.]

declared a breach of trust. But it should seem they cannot in any case be compelled to suffer a recovery contrary to their own judgment. See further 1 Sanders on U. & T. 294, and Fearne Cont. Rem. 303. 325. et seq. 7th edit.

(K) And even without his being a party to the suit of which that decree is the termination, post, 540, 1.

(L) The printed reports of *Wortley v. Birkhead*, fully substantiate this marginal deduction, though the former part of it is not, in terms, adduced in the text. For confirmation of the doctrine that a third mortgagee may, *pendente lite*, buy in the first incumbrance that confers a title to the legal estate, and thereby acquire a preference to mesne mortgagees, reference is made to page 540, 1, post, and to the case of *Belchier v. Butler*, 1 Eden's Rep. 523, cited ante, page 453, note (B) fully. As to notice created by decree, see post, 547, *in notis*.

Purchaser of prior incumbrance *pendente lite*, good.

In the case of *Knott, Ex parte*, 11 Ves. 619, which has been questioned as to other points, Sng. V. & P. 646, 5th edit.) Lord Eldon distinctly acknowledged this doctrine as settled by *Wortley v. Birkhead*. His Lordship observed, that there was difficulty upon the point as to a decree to settle priorities. After that you could not tack certainly, (*Wortley v. Birkhead*, 2 Ves. 571,) for there was a judgment for the creditors that they should be paid ac-

Tacking allowed up to decree to settle priorities, not afterwards.

Wortley
v.
Birkhead.

incumbrance bought in after the decree to his mortgage? Lord Chancellor Hardwicke, as to this part of the case, said, that there was no case wherein it had been determined that a *puisne* incumbrancer, a party (M) in a cause, and a *decree made*, in that cause, for satisfaction of incumbrancers *according to their respective priorities*, having taken in a prior to tack to his *puisne* incumbrance, should be allowed to make use of it in any other shape, than that in which the original incumbrancer might use it, had no such purchase been made. He thought it would be most mischievous and pernicious, if the court should allow the doctrine of tacking to be carried to that extent; first, taking it upon the terms of the decree; all those decrees, where there were several incumbrances before the

cording to their priorities. But you might, as was held in the House of Lords in *Belcher v. Renforth*, 6 Bro. P. C. 28, up to the time of the decree, struggle for the *tubula in naufragio*, and though the decree was in a sense only a judgment upon the rights, as they stood at the time the bill was filed, yet it was decided in that case, that until the decree you might do so.

[539 *]
Commission of
bankrupt and
decree to settle
priorities, dis-
tinguished.

Another point insisted on in *Knott Ex parte*, ubi supra, was, that a commission of bankrupt had the same effect as a decree. That, Lord Eldon said, was not so. The commission was no judgment for creditors. It was only a conveyance for the security of creditors, and that the utmost that could be stated from all the cases was, that the question was to be agitated between persons having securities, and the assignees, as persons having securities, or as purchasers for valuable consideration. The point being given up as against the mesne incumbrancer, who, it was admitted, was to be considered as having all the rights of a purchaser for valuable consideration, the case was reduced to the question whether the assignees were to be so considered; or as having any right in equity beyond what the bankrupt himself would have had: the petitioner insisting, that, if the assignees come to redeem under the circumstances of this case, he might hold the same language to the assignees as he could to the bankrupt, namely, that there should be no redemption until all the money was paid that was advanced on the faith of the land.

Decree first,
then judgment
in ejectment:
former prefer-
red.

In *Sumner v. Kelly*, 2 Sch. & Lef. 398, a bill was filed by a mortgagee on behalf of himself and other creditors, for a sale. Pending this suit, a prior judgment creditor, not a party to the cause, issued a *scire facias* against the heir and ter-tenants of the mortgagor, and obtained judgment at law, grounded on an ejectment. In the mean time the plaintiff in the cause had obtained a decree to account, and that the master should advertise for other creditors to come in and prove their debts, &c. The elegit creditor then moved for liberty to execute his *habere* notwithstanding the decree, but the court would not allow its proceedings to be disturbed by permitting any creditor to obtain possession; and therefore refused the motion.

(M) Or even without his being a party, vide p. 558, n. (K).

court, a sale directed, and every thing necessary to clear the estate, in order to that sale, proceeded on the foundation, *that the rights of the parties* were to be taken as they stood at the time of the decree; and therefore they directed an inquiry into the priorities. What then were those priorities? Why, such as they stood at the time of the decree: not that afterwards the priority should be varied. The sense, reason, and justice of the case required it should be so; for otherwise, if, (where an incumbrancer, or an estate, which was affected with several charges, brought a bill for satisfaction thereof, and there were all proper parties and a decree for it, as between himself and the owner of the equity of redemption, some of the incumbrances being prior, others posterior to his) one of those defendants, who happened to be prior to him, was allowed to convey to another defendant, who was *puisne* to him, it would shut out the plaintiff after the decree made, at which time the rights were considered. What would be the consequence? Nothing could lay a foundation for greater collusion and contrivance, between the parties, to exclude each other, than such a liberty would, and that to the great deceit of the plaintiff: for then a man would lose his costs by such a proceeding, although he had a right to his debt, principal, interest, and costs, according to the respective priorities; that was the direction of this decree; and there was a sufficient fund, according to the then right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of these defendants might, by a collusion, give a third incumbrancer more than his debt, and it would be worth while to do so, in order to exclude another, who happened to be a second incumbrancer. It would be carrying securities to market in that manner, whereby the purchaser of them should not only stand in the place of the party selling, but would acquire a new equity, which it would be mischievous to allow; and therefore his Lordship said, he never was clearer in opinion than upon this part of the case, as to the general right.

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Birkhead.

[540]

So, where S. a *puisne* incumbrancer (1), after the bill brought, and, after the first decree made, and, in truth, after

Assignment of
prior mortgage
after decree, no
avail.

(1) *Bristol v. Hungerford*, 2 Vern. 524, pl. 5. [S. C. ante, 436, n. (c).—Ed.]

Wortley
v.
Birkhead.

the report, got an assignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held, that the assignment obtained by him being after the decree made, he should not profit by it or change the order of payment, but should come in according to the time of his own incumbrance, without regard to the old judgment and mortgage.

Same as to incumbrancers, who are not parties to suit.

And the law is the same as to incumbrancers who are not parties in the suit, *but who could come in under the decree*; for they must come in upon, and submit to, the terms of that decree, though no parties (*m*).

But suit between mortgagees no obstacle to tacking.

But a third mortgagee may purchase in a first mortgage, and defend himself thereby, notwithstanding a suit depending between the respective mortgagees.

Ita, third mortgagee may purchase first mortgage pendente lite.

[541]

Thus, where the second mortgagee (*n*) filed his bill against the mortgagor, and the first and third mortgagees to be let in to pay off the first mortgage, and that then the estate should be sold, his own mortgage paid, and the third be satisfied out of the remainder; and pending the suit the third mortgagee bought in the first mortgage; it was determined that by this he had gained a priority, and should be paid his whole money before the second mortgagee (*N*).

(*m*) 2 Ves. 575.

C. C. 63. S. L. *Turner v. Richmond*,

(*n*) *Robinson v. Davison*, 1 Bro.

ante, 436 a [and 547, post.—Ed.]

Lord Eldon's hint that notice to prior mortgagee of second charge, would prevent his selling his mortgage to third incumbrancer, considered untenable.

(*N*) In *Mackreth v. Symmons*, 15 Ves. 329, the Lord Chancellor asked if there was any case where a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second. The case of *Robinson v. Davison*, cited in the text, must certainly be the case sought; there the first mortgagee, when he conveyed to the third, had a bill filed against him by the second, which was clear notice of the second charge. But this may be said to be constructive notice only, and no proof of the first mortgagee's knowledge of the second incumbrance, though he ought to have known it. To meet this slender objection, it is observable, that another case has been decided where the first mortgagee, when he conveyed to the third, had not only notice of the second mortgage by means of a bill filed against him for redemption, but had actually, by his answer, submitted to be redeemed by the second mortgagee, yet a conveyance by him to the third mort-

However, in many cases (o) a suit pending in equity against land, is a bar to alienation; for *pendente lite nihil innovetur* (o): therefore the vendor of lands, pending a suit in equity

Suit notice to whole kingdom, and bar to alienation.

(o) Vide *Worsley v. Earl of Scarborough*, 3 Atk. 392.

gagee, before any redemption by the second mortgagee, was held good. See *Belkier v. Butler*, cited ante, 455, n. (B); and it may be asked, if notice to the third mortgagee of the second incumbrance, at the time of his purchase of the first mortgage, be immaterial, why should notice of such second incumbrance to the person who is about to sell his prior mortgage to the third mortgagee, raise an impediment to the sale? Does not the law, which confers on one person a right to purchase, also confer on some other a power to sell? for otherwise there could be no purchase, and the law allowing a purchase, would be nugatory and useless. But it may be said, that a collateral law might enact, that such power of sale should be exercised with certain restrictions, as that, if the vendor have notice of a *mesne* claimant, who has more equity than the intended purchaser, in fact, a *quasi* right of pre-emption, that then the vendor shall not sell without giving to such *mesne* claimant the option of first purchasing the article for sale. It must, however, be remembered, that a mortgagee is a purchaser *pro tanto*, and, to the extent of his charge, has an unshackled interest in the property mortgaged, which he may dispose of from time to time as he shall deem expedient; and that a first mortgagee has nothing to do with the ulterior incumbrancers who take estates subordinate to his. It may also be observed, as an analogous case, that a trustee is not prohibited from selling, or a purchaser from buying the trust estate, except so far as the trustee will thereby become liable for a breach of trust, and the purchaser, if he have notice of the trust, will himself become the trustee. A little reflection would suggest many inconveniences attending the rule above hinted at by the noble Lord; and the Editor, with much deference and humility, submits, that on principle it could never be supported, and that since two cases have been found, which answer the question proposed in the affirmative, and which say, that though the first mortgagee knew of the second mortgage or incumbrance when he conveyed to the third mortgagee, yet that such knowledge shall not vacate or affect the sale and purchase, all importance which necessarily attaches to a hint from so high an authority, must fall to the ground. This case of *Mackreth v. Symmons*, is stated by Mr. Sugden to have been re-heard by the Lord Chancellor with the assistance of two Judges. Sugd. V. & P. 466, 5th edit. But no report of the re-hearing has yet appeared.

(O) This maxim is not universally true, and therefore the learned author very properly qualifies his proposition with the words "in many cases a suit depending is a bar to alienation." A first mortgagee being a defendant, may convey to a judgment creditor also a defendant, in a suit by a second mortgagee, and the purchaser *pendente lite*, may hold against the plaintiff until his judgment be redeemed. *Turner v. Richmond*, 2 Vern. 81. The maxim, that an alienation by the defendant *pendente lite* is absolutely void as against the plaintiff, engenders this consequence, that though the bill should be dismissed, the purchaser could not sue; which cannot be admitted. The cases import

Suit no bar to alienation.

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against them, can give no title but what will be subject to its issue; but it is the pendency of the suit that creates the notice,

no more than that the suit may be carried on without bringing before the court the purchaser *pendente lite*. In *Metcalf v. Pulvertoft*, 2 Ves. & B. 204. S. C. 1 ibid. 180, and 18 Ves. 84, the Vice-Chancellor adopted this mode of argument, and held, that the effect of the maxim *pendente lite nihil innovatur*, if understood as making the conveyance wholly inoperative, not only in the suit depending, but absolutely to all purposes in all future suits and all future time, was founded in error. If that maxim could be carried so far, it would produce this consequence, that if the suit, instituted by the wife against her husband, in the case before the court, failed, and the purchaser instituted a new suit to avail himself of his purchase, he could have no benefit of it in law or equity, being null and void when executed. These expressions were to be taken in a qualified sense, and the true interpretation of this rule was, that the conveyance did not vary the rights of the parties in that suit: that it gave no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it was very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them, it was as if it had never existed, otherwise suits would be indeterminable if one party pending the suit, could, by conveying to others, create a necessity for introducing new parties. The voluntary act, therefore, of the defendant conveying to another, could not vary the situation or affect the rights of the plaintiff. The *lis pendens* was presumptive, if not actual, notice, and the purchaser was in the same situation in which the vendor stood, upon this plain principle, that the suit was to be decided according to the state of things when it was instituted, and the rights, however they might be varied by death, bankruptcy, &c. could not be affected by the voluntary act of either party. In the case before the court, a voluntary settlement had been made by the defendant in favor of the plaintiff, who filed a bill to have the trust thereof performed; but pending the suit, the defendant sold the estate to a purchaser; and it was held that he had a right so to do. In like manner if there be a settlement with power of revocation, the settlor may revoke the settlement, although a suit be depending for carrying it into execution. See *Metcalf v. Pulvertoft*, *ubi supra*.

Sale pendente lite not void, but voidable only.

In a case where a devisee of lands, charged with the payment of debts, sold, pending a suit by the creditors for a sale and payment of the debts, it was held, that such an alienation would be *absolutely void*. *Sed quare* the substitution of the word "*voidable*," for the words "*absolutely void*;" and see ante, 224, n. (M). In *Gaskell v. Durdin*, 2 Ball. & Bea. 167, Lord Manners observed, that the rule of the court undoubtedly was, that any interest acquired in the subject-matter of a suit pending the suit, was so far considered a nullity, that it could not avail against the plaintiff's title; and if this rule were not attended to, there would be no end to any suit. The justice of the Court of Chancery would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. It was extremely difficult to draw any line, yet very dangerous to allow a rule to be frittered away by exceptions. But it was a general rule, that whoever dealt with the defendant for an interest in

Property in question dealt

for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there; and to prevent a greater mischief than would arise by people's purchasing a right under litigation and then in contest (P).

J.F. having only one daughter, and desiring to keep part of his estate in his name (p), by will, made in 1684, devised a messuage to F., his near kinsman, in tail male, with remainder over, and gave his lands in Sussex to his daughter, who married D.; they, with C., were supposed to have destroyed the will after the death of the testator. F. brought his bill against D. and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will against them, and all claiming under them. The estate devised to F., having been mortgaged by the testator prior to his will to B. for 100%. N. pending the suit bought in B.'s mortgage, and purchased the equity of redemption from D. and his wife. N. was served with the former decree, and appeared, and was examined, and set out his title under this mortgage, whereupon F. was put to bring his bill to redeem. N., by answer, alleged, that although he had been informed before his purchase that it was pretended there had been such will made, yet, upon inquiry, he had been assured and satisfied that it was destroyed by the testator in his life-time, and therefore he proceeded in his purchase, and insisted, that the former decree, to which he was no party, was unjust in decreeing the lands to be enjoyed ac-

Devisee obtains decree against heir. Pending the suit, A. gets assignment of a mortgage made by testator, and then purchases equity of redemption of heir, with notice of will. A. not permitted to dispute justice of decree, nor to try at law whether will was cancelled.

(p) *Finch v. Newnham*, 2 Vern. doctrine of notice is extended to a 217; et vide *Fleming v. Page*, Finch, criminal case. 3 P. Wms. 116, 320. Et *Herbert's case*, where this

the property in question after a bill filed, so dealt with him, subject to the decree which might be eventually pronounced, and his Lordship cited *Winchester v. Beaver*, 3 Ves. 314; *Garth v. Ward*, 2 Atk. 174, and *Winchester v. Payne*, 11 Ves. 194; in which latter case the noble Lord observed, that Sir William Grant was of the same opinion with himself, the only doubt in that case being, whether it might not be necessary to institute a suit to defeat the conveyance, but none existed with regard to the result of such a suit. See further, post, 547, in *notis*.

with, is subject to decree.

(P) But such a pendency of suit must be real and not collusive, 2 Ch. Ca. 116; et vide ante, 216, and post, p. 547, in *notis*, for further as to notice created by a suit in chancery.

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No notice by collusive suit.

according to the will; but, in regard he purchased *pendente lite*, and with notice that there was a will, the court would not admit him to examine the justice of the former decree, or to try at law whether such will was cancelled or destroyed by the testator, but declared he should be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

Decree to account affects every one with notice (q).

And where it is only a decree of account, and not such a one as puts a conclusion to the matter in question, that is still such a suit as affects people with notice of what is doing.

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Contra, where suit respects money secured on estate, and not estate itself.

But no case has gone so far, and it would be very inconvenient, if where money is secured upon an estate, and there is a question depending in Chancery upon the right of or about the money, but it is wholly a collateral matter, as to say that a purchaser of the estate pending that suit should be affected with notice by such implication as the law creates by the pendency of the suit. Therefore, where A. and B. were partners (q), A. died, having made his will, and devised to his executors and their heirs, "all his real and personal estate, "not by his will otherwise disposed of, in trust that they "should, by charging, leasing, or selling his estates, or any "of them, raise money for the payment of all his debts; and "what should remain, he directed to be divided into equal "portions, share and share alike, between his five children, "and left it to his executors to make proper allowances for "their maintenance, until there should be a distribution made "of his estates." A., amongst other things, had a mortgage for 3500*l*. In a cause between the executor of B. and A.'s executors, the mortgage deed was directed to be left in the hands of a Master in Chancery, till the partnership account should be finally adjusted. Afterwards A.'s executors conveyed the mortgage to Master Bennet, as a security for one of the executors, on his appointment to be receiver of another person's estate. And one argument used by the children of A., in a suit against the holders of the mortgage, by way of

(q) *Mead v. Lord Orrery*, 3 Atk. 256, et vide S. L. ibid. 392.

(Q) S. P. in *Culpepper v. Aston*, ante, 216; et vide post, 547, in notis.

security for the due discharge of the receivership, was, that there was a suit at the time of the assignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *pendente lite*. But Lord Hardwicke said, that he did not see how this *lis pendens* could affect this assignment, unless it had been determined that this was the mortgage of B., the partner of A., and belonged to his creditors, who were the plaintiffs in that cause. But that as it was therein determined to be A.'s estate, there was an end of that objection.

But in case of a real purchaser for a valuable consideration, *pendente lite*, the plaintiff will be held to strict proof of his own title.

Plaintiff held to strict proof of title against bona fide purchaser.

Thus, where a bill was brought by S. (r) against C., to have the benefit of a decree, obtained against L., for the recovery of a leasehold estate, held of the dean and chapter of St. Paul's; C. being a purchaser of this estate from L., *pendente lite*, but, as was proved, for the full value, and without any notice of S.'s claim, or any actual notice of the suit: for the plaintiff it was insisted, that this purchase, made *pendente lite*, was to be considered as made under an implied and constructive notice; but the court said, that although where there was a conveyance made *pendente lite*, without any valuable consideration, and to avoid and elude a decree, it ought to be highly discountenanced; and, though the alienation were for never so good a consideration, the purchase, if made *pendente lite*, was nevertheless to be set aside, yet, where there was a real and fair purchaser, without notice, it was a very hard case, especially in a court of equity; and, there being some defect in part of the proof in deraigning the title of S., leave to amend, or make any new proof, after publication, was refused, and the bill dismissed.

Purchase pendente lite without actual notice for valuable consideration, set aside, see ante, p.541, note (n).

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In this case (s) the Chancellor [Lord King] observed, that it was a difficult matter to search for bills in equity, or to get

Hardship of rule making lis pendens notice.

(r) *Sorrel v. Carpenter*, 2 P. Wms. 482.

(s) *Sorrel v. Carpenter*, 2 P. Wms. 482, et vide 3 Atk. 243.

notice of them; many such being, after filing, kept in the six clerks' desk: and that though the court would oblige all persons to take notice of its decrees, as much as of judgments at law, yet there did not seem to be the same reason for obliging people to take notice of the filing of a bill.

Bill to perpetuate testimony, notice.

And if a purchase or mortgage be made, pending a bill, to perpetuate the testimony of witnesses to a will of land, the proceedings may be read against a purchaser or mortgagee during the suit, although he hath not notice either express or implied. This rule is founded upon the necessity of the case; for if depositions, taken in such a suit, could not be read against a purchaser under the heir at law or devisee, it would be in their power to prevent such a bill from being of any effect. For instance, suppose an heir at law (having got into the possession of an estate on the death of his ancestor, and the devisee, being out of possession, brought a bill to perpetuate testimony, and to prove the will), pending the suit, made a secret conveyance to another person, if the depositions taken in the cause could not be read against the person who claimed under the heir at law, the whole object of the suit would be defeated.

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The case would be just the same, in respect to its consequences, if a devisee, having got into possession, the heir brought a bill of this sort, and afterwards the devisee made a private conveyance; if the heir at law could not read the depositions which were taken in that cause against a party claiming under him, the bringing the bill would be of no manner of effect.

Accordingly, in a case (*t*) where J. made her will, and thereby devised all her real and personal estate to C. and N. in trust, that they should sell the same, in order to discharge her debts and legacies, and that the surplus should be distributed into three equal shares, one share whereof was to go to C., another share to K., and a third to T. Soon after the making

(*t*) *Garth v. Crawford*, Barn. Rep. 450. S. C. By the name of *Garth v. Ward*, 2 Atk. 175.

Garth
v.
Ward.

the will J. died, leaving G. her heir at law; K. and T. were papists, but C. was a protestant. In April, 1736, T. mortgaged her interest in this estate to W. for 108%. In May, 1736, a bill was brought by C., K., and T. against G., the heir at law, in order to perpetuate the testimony of the plaintiffs witnesses, and to prove the will of J. On the 3d of January, 1737, W. purchased of T. her equity of redemption in this estate for 1000%. On the 8th of January following, G. put in his answer to the bill, insisting thereby, among other things, that K. and T. were papists, and consequently incapable, by the statute of 11 William 3, to take by the will of J. In that cause G. examined several witnesses, to shew that K. and T. were papists. A bill was then brought by G. against C., K., and T., and likewise against W., in order to set aside the will of J., with regard to two-thirds of her real estate, which was to be sold, and the money arising from the sale to be paid to K. and T., and likewise, that K., T., and W. might account for the profits of those shares. After the answers to this bill were come in, an order was obtained, that the depositions in the former cause might be read in the present one saving just exceptions; but, on offering them to be read, it was objected on the part of W., that they could not be read as against him, he being no party to the former suit, his mortgage being made before the filing of that bill, and his purchase of the equity of redemption having been before the answer of G. came in.

But the Lord Chancellor was of opinion that these depositions ought to be read; and his Lordship distinguished between the mortgage to W., and his purchase of the equity of redemption; for, as to the mortgage, which was stated to have been made before the filing of that bill, his Lordship was of opinion that none of the depositions taken in that cause could any ways be read to affect that; but, with regard to the purchase of the equity of redemption, which was made subsequent to the filing the bill, they ought to be read; and his Lordship said, that the answer not coming in until after the equity of redemption purchased, made no difference; for it very often happened, by the ordinary indulgences which were given to the putting in of answers, that an answer did not come in to a bill until long after it was filed.

*Judgment of
court.*

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No *lis pendens* by bill that cannot be heard.

But, in general, a bill (a) that cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser, claiming under one of the parties, after filing of the bill.

Decree for money not binding on bona fide purchaser without notice; for debt by decree is lien on person not on land.

And it seems, that a decree (x) in a court of equity, for money, does not affect a purchaser for a valuable consideration, without notice thereof, any more than a judgment at law; for a decree is not of superior force to a judgment; nay, its effect is inferior; and where it is said a decree is equal to judgment, or to be paid equally therewith, this must be intended only out of the personal estate, for a decree for a debt does not bind the real estate, it acting only in *personam*, not in *rem*; and the remedy upon a decree to affect the land is only for a contempt, whereupon the party proceeds to a sequestration, and that is but a personal process, as appears by its falling and abating by the death of the party.

Tacking not prevented by bill of discovery.

A bill of discovery depending will not prevent *even* a party to the suit from securing himself, by purchasing in an incumbrance prior to his own. Thus (y), where L., the defendant in the cause, having an incumbrance on the lands in question, subsequent to the plaintiffs, and the bill being against him and other incumbrancers, to discover their incumbrances purchased of W., who was a defendant, had the first incumbrance, and had assigned to L. *pendente lite*; the question at the hearing was, whether the defendant L., who had a mortgage subsequent to the plaintiffs, should help himself against him by buying in W.'s incumbrance that was prior to both? It was resolved he might lawfully do so; and the plaintiff's bill was dismissed without costs (R).

(a) *Garth v. Crawford*, Barn. Rep. temp. Talb. 217. 2 P. Wms. 672. 454. S. C. 2 Eq. Ca. Abr. 687, pl. 13. 1 Ves. 496.

(x) *Searle v. Land*, 2 Vern. 88. (y) *Hawkins v. Taylor*, 3 Vern. 29. 1 Eq. Ca. Abr. 532, pl. 4. 2 Ch. Ca. [et vide 2 Ves. 571.—Ed.] 48. Et vide 3 P. Wms. 401; et Ca.

Of notice by *lis pendens* and decree.

(R) The design of this note is, to consider the modern understanding of the profession with regard to what notice is created by a *lis pendens* and a decree.

Lis pendens defined.

1st. As to a *lis pendens*. To constitute a *lis pendens*, a bill must be filed and a subpoena served, but the service of a subpoena alone will not be sufficient to

Again (x), if a mortgagee, having had notice of incum-

(x) *Greswold v. Martham*, 2 Ch. Ca. 170, ante, 292, et seq.

*Bill to fore-
close no ob-
stacle to tack-
ing.*

create a pendency of suit. The effect of a *lis pendens* commences from the time of serving the subpoena. The question in dispute must relate to the estate, and not merely to money secured upon it (*Worsley v. Scarborough*, 3 Atk. 392); but a bill to perpetuate the testimony of witnesses and to establish a will, will, it seems, be a sufficient *lis pendens* to affect a purchaser.

Where a person is to be affected with a *lis pendens*, there ought to be a close and continued prosecution of the suit. *Preston v. Tubbin*, 1 Vern. 286. Lord Bacon, in his Law Tracts, p. 282, edit. 1737, seems to require the same degree of diligence; at least he directs, that if a purchase be made *pendente lite* after some long intermission, that shall vary the judgment of the court from the common case. But the rule, though reasonable, says Lord Nottingham, in his Prolegomena of Equity, c. 15. is not always observed; for in *Martin v. Stiles*, 1663, [S. C. nomine *Stile v. Martin*, 1 Ch. Ca. 150] the bill was filed in 1640, and abated by death in 1648; a bill of revivor was filed in 1662, and the purchase was in 1651, and yet the purchaser was bound. The purchase there was subsequent to the abatement, and previous to the revivor. Lord Nottingham adds, because by relation of the bill of revivor, it was *pendente lite*, per Clarendon, Chancellor. In regard to the abatement, by the death in 1648, the late Master of the Rolls, in a modern case, thought, that if the mortgagees had acquired their title during the abatement of the suit, there would have been great difficulty; but his Honor cited the above passages from Lord Nottingham's Prolegomena, as authority for the position, that a purchaser during the abatement of the suit will be bound in the same manner as if the suit were in full prosecution; observing, that the Lord Keeper Nottingham did not conceive it deserving of remark, that the purchase was made during an abatement, and the purchaser was not a party at the time of the revivor. But it was not necessary, added Sir W. Grant, to give any opinion upon that; for, undoubtedly in the case before him, the suit was depending when the mortgages were made. Therefore the mortgagees could never establish in chancery a right to redeem.—Thus the point, that a close continued prosecution of the suit is necessary to create a *lis pendens*, remains still undecided. But the probabilities are in favor of the Lord Keeper's doctrine, unless perhaps it can be proved that flagrant laches are attributable to the plaintiff, in not reviving and continuing the proceedings.

*Whether suit
must be closely
prosecuted.*

A *lis pendens*, either at law or in equity, is constructive notice; and whoever purchases while a suit is depending will, by construction of equity, have notice of that suit, and must abide by all its consequences, Co. Litt. 544 b.; for otherwise the party might alien the land and baffle justice, *Anon.* 1 Vern. 318, and see *Self v. Madax*, ibid. 459; and this doctrine, it is said, prevents a traffic being made of litigated titles. *Hiern v. Mill*, 12 Ves. 120. Et vide *S. L. Moor v. Moor*, Barn. C. C. 407. The practice in the Six Clerks Office is, that entry in the bill book is notice to the defendant. Belt's Supp. to Ves. sen. p. 42.

*Lis pendens is
constructive no-
tice.*

In equity, by means of a bill of revivor and supplementary bills, heirs, ex-

*Right of plain-
tiff cannot be*

brances, and, having been tendered his money, afterwards

altered during
suit.

Purchaser pen-
dente lite bound
by decree.

[549 *]

Same law as
to mortgagee,
though decree
be against re-
presentative of
mortgagor.

be introduced into the suit, although they originally were not parties. But the defendant cannot, by will or by any other means, alter the rights of the plaintiff, though he may change the parties.

In *The Bishop of Winchester v. Payne*, 11 Ves. 197, an objection was taken to the Master's report, that two mortgagees of the equity of redemption were not brought before the court; and, therefore, that they were not bound by the decree of foreclosure. The answer was, that they became mortgagees after the bill of foreclosure was filed, and one even after the decree nisi. It was however contended, that this answer was not sufficient in law: and, first, it was argued, that all incumbrancers, at whatever period they become such, must be made parties to the suit to be bound by the decree: and, secondly, that supposing that not generally so, yet in this case the suit having abated by the death of the mortgagor, the plaintiffs ought, when they revived, to have made parties all who had at that time any interest in the estate.—According to the opinion of Sir William Grant, M. R. there was no foundation for either proposition, for both of them seemed to be in direct opposition to the established rule of the court, as to the effect of the *lis pendens*. Ordinarily, it was true, the decree of the court bound only the parties to the suit. But he who purchases during the pendency of the suit, will be bound by the decree that might be made against the person from whom he derived title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed; otherwise suits would be indeterminable, or, which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined. The rule might sometimes operate with hardship upon those who purchase without actual notice, yet general convenience required its adoption, and a mortgage taken *pendente lite* could not be exempted from its operation.

And Sir William Grant, adopting the language of Lord Hardwicke in *Garth v. Ward*, 2 Atk. 174, asked whether, if during a suit by the mortgagor for redemption he should assign his equity, and in the final hearing of the cause there should be a decree against him alone,—whether the assignee of the equity of redemption would not be bound by the decree? *A fortiori*, the mortgagee would be entitled to the benefit of the rule where he was not passive, but was actually prosecuting his remedy; which would be wholly fruitless, if the mortgagor could by making new mortgages, compel him to add new parties. And his Honor observed, that the case before him was not concerning the legal estate acquired during the suit, in which instance it might be necessary in order to avoid it, to have recourse to a new suit, but it was a mere equity to be pursued only in equity, and there it could not be pursued with effect; and if the mortgagees could be bound by a decree against the mortgagor, did not the consequence follow, that they should be bound by the decree against his representative? The heir and devisee were merely in the place of the original party. Their title was by his death, and the suit against them stood in the same plight as it did against him; et vide what is said of this case by Lord Manners, in *Gaskell v. Durdin*, 2 Ball & Bea. 167, cited, ante, 542, n. (O).

Whether suit
must be insti-

Lord Manners, in a modern case (*Moore v. M'Namara*, 2 Ball & Bea. 186), truly observed, that it was undoubtedly a rule well founded in principle, that

procures a decree to foreclose, and then purchases the equity

were a person takes a lease from a defendant *pendente lite* of lands which are the subject-matter of the suit, and the title to which, as well as the possession, are claimed by the bill, the Court of Chancery will pay no regard to a lease so obtained, but will execute its process by giving possession to the claimant; nor would the court on motion relieve a person so dispossessed, but leave him to institute a suit, for the purpose of rendering the title so acquired available if he could. The court therefore would not, on motion of a creditor coming in under a decree, directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will with a leasing power; for the creditor coming in under the decree, derived title from the same instrument, which gave him a right to a sale. He could not therefore complain of the lease unless there should be a deficiency to pay the debts, and then Lord Manners apprehended there must be a suit instituted for the purpose of setting aside that lease. But whatever might be the result of such a suit, the court could not in a summary way by motion set aside the lease.

In *Daly v. Kelly*, 4 Dow. P. C. 428, it was made a question whether one, becoming mortgagee of an estate in litigation *pendente lite*, without making himself a party to the suit below, might appeal from the decree in the name of the party mortgagor, who refused to appeal. This point was not decided; but from some observations of the learned Lords, it seemed to be considered requisite, that where an estate in litigation in equity is aliened *pendente lite*, the alienee having the legal estate, should be brought before the court in order to convey. But the court, it was said, would restrain vexatious alienations *pendente lite*. 4 Dow. 440. Et vide further as to this, latter end of note, p. 541, ante; and as to the effect of a *lis pendens* on transactions between third persons, see *Faulkner v. O'Brien*, 2 Ball & Bea. 214.

If a bill be dismissed, and afterwards an appeal be brought in the House of Lords for reversal, on the ground that the decree of dismissal was obtained by fraud, this, it seems, by the opinion of Lord Redesdale, in *Gore v. Stackpole*, 1 Dow. P. C. 31, will be a pendency of suit sufficient to affect a purchaser or mortgagee, who, though not cognizant of the fraud, will nevertheless be considered as having had sufficient means of acquiring a knowledge of it by an examination of the proceedings in the cause; for the question is still pending whether the bill was rightly dismissed or not; and Lord Redesdale considered the appeal in the House of Lords to be that continuation and pendency of suit which would affect all persons with notice, and concluded his observations on the case before the House, by declaring it to be his opinion, that the parties who had purchased between the decree of dismissal and the commencement of the appeal, had, by the latter proceeding, notice of the settlement; and that they therefor must take the same subject to all legal and equitable consequences; for such a circumstance could never be allowed to intercept the course of justice.

A purchaser *pendente lite*, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit. Suppose an estate has been in controversy for twenty years in the Court of Chancery, and during the suit it is purchased, the purchaser, on filing a supplemental bill, comes into court *pro bono et malo*, and will be liable to all the costs in the proceedings,

tuted to set aside conveyance made *pendente lite*.

Whether mortgagee may appeal.

Alienee of legal estate *pendente lite* must be made party to convey.

Appeal against decree of dismissal is a continuation of suit and a *lis pendens*.

[550]

Purchaser filing supplemental bill comes in *pro bono et malo*.

Anon. 1 Atk. 89; and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings. *Finch v. Newham*, 2 Vern. 216.

Mortgagee buying prior incumbrance pendente lite an exception.

To the whole of this doctrine on constructive notice by means of the pendency of suits, there is one exception, and that is, where a third mortgagee obtains the legal estate from the first incumbrancer, or from a trustee pending a bill by a second mortgagee to redeem the first. Thus in *Robinson v. Davidson*, 1 Bro. C. C. 63, the second mortgagee filed his bill against the mortgagor and the first and third mortgagees, to pay off the first mortgage, praying that the estate might be sold, his own mortgage paid, and that the third mortgagee might be satisfied out of the remainder. Pending the suit, the third mortgagee bought in the first mortgage; and the Lord Chancellor determined that by this he had obtained a priority, and should be paid his whole money before the second mortgagee. Et vide further *Belchier v. Butler*, 1 Eden, 523, cited, ante, p. 455, n. (B); and as to the purchase of an equity of redemption *pendente lite*, 15 Ves. 336, note; and *Toussaint v. Steere*, 3 Meriv. 210; and it is lastly observable, in this division of the note, that a *lis pendens* being only a general notice of an equity to all the world it cannot affect any particular person with fraud, unless such person had also express notice of the title in dispute. *Mead v. Lord Orrery*, 3 Atk. 243.

Decree formerly held to be notice.

2d. As to a decree by the sixth resolution in *Snelling v. Squibb*, 2 Ch. Ca. 48, Lord Nottingham seems to have determined that a decree would be notice to all persons who are not parties to the suit; and that perhaps on the consideration, that inasmuch as a *lis pendens* would in equity affect all mankind with notice, so a decree, which is the determination and final award of the merits of that suit, should also be even fuller notice than the suit itself. The resolution is in these words, "A purchaser from J. S., who has a decree against him in Chancery for land, shall be bound by the decree, though he had never notice of it, and yet the decree in Chancery binds the person and not the land; and the judgment may bind the person or the land. And it is hard that the Chancery, whose power is only over the person, should execute their own decrees against a purchaser, and not assist the execution of a judgment at law. Whereas a purchaser after a judgment is as innocent as a purchaser after a decree in point of conscience." So in *Sorrell v. Baker*, (ante, 545) Lord King is reported to have said, that a Court of Equity will oblige all persons to take notice of its decrees as much as of judgments at law.

Decree not of itself notice now.

Judgments at law, however, are not of themselves notice, as we have already seen. The docketing a judgment is merely to enable a purchaser or mortgagee to discover what incumbrances affect the property if they chose to inquire for them; but unless it can be proved that they have searched the dockets, or have had actual notice of the existence of judgments, the plea of a purchaser without notice may be supported. And it was expressly held by Lord Hardwicke, in *Worsley v. Scarboro'*, 3 Atk. 392, over-ruling the resolution and dicta of Lords Nottingham and King, that there was no such doctrine in the Court of Chancery, that a decree made there should be implied notice to a purchaser after the cause was ended; but it was the pendency of the suit that created the notice; for as it was a transaction in a sovereign court of justice, it was supposed all people were attentive to what passed there, and it was to prevent a greater mischief that would arise by people's purchasing a

of redemption, such incumbrances will not be affected by the decree (s).

If a mortgage (a) be made, and afterwards a commission of bankruptcy be taken out against the mortgagor, and the

Commission of bankrupt prevents tacking being in itself notice.

(a) *Hitchcock v. Sedgwick*, 2 Vern. 156. Ca. temp. Talb. 70.

right under litigation and then in contest; but where it was only a decree to account and not such a one as put a conclusion to the matters in question, that was still such a suit as did affect people with notice of what was doing; for the *lites pendentes* were not thereby terminated. And in another case (*Rivers v. Steele*, cited by Mr. Cox in his manuscript notes to 1 Vern. 286, in Lincoln's Inn Library) Lord Hardwicke is said to have held, most distinctly, that decrees are not notice. He said there was no such doctrine that men were to take notice of the decrees of the Court of Chancery, though they were to take notice of a *lis pendens*; and now the prevailing opinion of the profession is, that decrees are not of themselves notice, although a suit closely prosecuted is. See Sug. V. & P. 643.

But though, in general, a decree will not be constructive notice to persons not parties to it, yet if a person not a party to the suit have express notice of the decree, he will be bound by it. Thus in *Harvey v. Montague*, 1 Vern. 57, a mortgagor having notice of a decree (he being present at the hearing, &c.) was ordered to pay money over again to the amount of 10,000*l.*, which he had previously paid in to a person not entitled to receive the same under the decree; and though the hardship of this double payment was insisted on, yet it being voluntary, and as it was argued, not only contrary to, but for the purpose of preventing and avoiding the decree, the court thought the mortgagor was not entitled to any relief, but ordered him to pay the money over again.

Repayment ordered after actual notice of decrees.

(S.) That is, if an eigne mortgagee foreclose his mortgage without making the puisne mortgagee a party to the suit, having at the same time full notice of such incumbrance, the puisne mortgagee may after the foreclosure redeem the estate in the hands of the eigne mortgagee, or, by buying in a prior incumbrance, conferring a title to the legal estate, and tacking his puisne mortgage to the prior incumbrance, commence an action of ejectment notwithstanding the decree of foreclosure, see ante, p. 292. The case of *Greswold v. Marsham* was distinctly acknowledged as good law by the Master of the Rolls, in *Toulmin v. Steere*, 3 Meriv. 224, who observed that the cases of *Greswold v. Marsham*, 2 Ch. Ca. 170, and *Mocatto v. Murgatroyd*, 1 P. Wms. 393, were express authorities to shew, that one purchasing an equity of redemption could not set up a prior mortgage of his own, nor consequently a mortgage which he had got in against subsequent incumbrances of which he had notice; and his Honor could not see how a distinction could be made in point of legal effect between personal notice to the party, and notice affecting him through the medium of his agent. A mortgagee purchasing the equity of redemption is bound by judgments of which he has notice, although they are entered up subsequently to the mortgage. *Crisp v. Heath*, 7 Vin. Abr. 52, (E), pl. 2; *Barnet v. Weston*, 17 Ves. 130, cited, *infra*, p. 559, in the last note to this chapter, sect. II. pl. 12.

Mortgagee purchasing equity of redemption cannot set up his own mortgage against incumbrances of which he has notice.

commissioners *make an assignment* of the estate; and then money be lent to the mortgagor on a second mortgage, the mortgagee *having no actual notice* of the commission, in such case, although the *puisne* mortgagee purchase in the first security, yet it will not protect the mortgage subsequent to the commission of bankruptcy. The reason for which I apprehend, is, that a commission of bankruptcy is an act of public notoriety, by which all men are bound, on the ground of presumed notice.

[552]
Act of bank-
ruptcy not no-
tice. Semb.

And indeed it seems as reasonable, that a purchaser should be denied the benefit of protecting himself by the purchase of a prior incumbrance, after a commission of bankruptcy sued out, and before the assignment of the effects, as after a decree; for a commission of bankruptcy is a public act of the court, and operates as a decree *in rem*; in which respect it differs from a decree for money, or a judgment on a personal action, and, though an *ex parte* proceeding at first, yet, if it be not afterwards superseded, the property of the bankrupt is thereby determined to belong to his creditors in an equal proportion, according to their several demands; and it differs from an act of bankruptcy, which is of so secret a nature, that it is impossible to be known, and has no visible operation until coupled with a commission (T).

Neither act nor
commission of
bankrupt in
themselves no-
tice.

(T) It is now the better opinion, that neither an act of bankruptcy, nor a commission of bankrupt is of itself notice to a purchaser or mortgagee. It appears that on appeal to the House of Lords in the case quoted in the text the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid 2200*l.* (the money advanced after the commission issued) with interest, costs, and such charges as mortgagees are usually allowed, which was of course deciding that a commission of bankrupt was not of itself notice to the mortgagee, and that advances made without actual notice, subsequently to the commission, might be tacked to the prior mortgage. See Mr. Cox's notes to his copy of Vernon (*Hitchcock v. Sedgwick*), in Lincoln's Inn Library. There are several conflicting cases on this subject; the principal of which are, *Collet v. De Golls*, Ca. temp. Talb. 65, cited *ais post*, vol. ii. 604. *Hargrave v. Le Breton*, 4 Burr. 2425, and *Hitchcock v. Sedgwick*, Dom. Proc. for the doctrine as above stated; and *Knott, Ex parte*, 11 Ves. 609. *Latouche v. Dunsany*, 1 Sch. & Lef. 152, and *Herbert, Ex parte*, 13 Ves. 183, against it. These cases are learnedly commented on by Mr. Sugden, in his *Trea. on Ven. & Pur.* p. 645, 5th edit.; and the above is the result of his observations. See

In all cases of a plea (b) of a purchase or marriage settlement, notice must be denied, though not charged by the bill; and it will not be sufficient to deny it, either by the plea or answer, *Notice must be denied, though not discharged in bill (U);*

(b) *Johnes v. Thomas*, 3 P. Wms. in *Brace v. Duchess of Marlborough*, 244, in *notis*, [namely, *Aston v. Curzon*, n. (f). See also 6th resolution 2 P. Wms. 491.—Ed.]

also vol. ii. p. 591, where this subject is more fully investigated. By the new act, the party must have actual notice of the act of bankruptcy, notice of his insolvent circumstance is not enough, *infra*, vol. ii. 592, n.

But whether an act of bankruptcy be or be not notice, if the mortgage has been effected, or the subsequent advances lent *bonâ fide* two months before the issuing of the commission, although subsequently to the act of bankruptcy, but without actual notice of it, it will be binding on the assignees of the bankrupt mortgagor, and they cannot redeem without paying all the money due. And this by a late act of parliament, 46 Geo. 3. c. 135, commonly called Sir Samuel Romilly's act. By that statute it is provided, that the issuing a commission of bankrupt against such bankrupt, although such commission shall afterwards be superseded, or the striking of a docket for the purpose of issuing a commission against such bankrupt, whether any commission shall have actually issued thereupon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of the act, if it shall appear that an act of bankruptcy had been actually committed at the time of the issuing such commission, or striking such docket. Consequently such purchaser or mortgagee, claiming the benefit of this act, cannot avail himself of a prior legal estate if a commission has actually issued, or a docket has been struck within two months after the time of his purchase or mortgage, although he may not have actual notice of the issuing of the commission or striking of the docket, because the statute expressly makes those acts constructive notice. See *vide* what is said of a case thus circumstanced in the note to p. 591, vol. ii. and as to redemption, see *ante*, 281, in *notis*, and p. 525, note (W).

But if commission issued, act of bankruptcy notice under Romilly's act.

(U) The defendant must swear he had no notice at or before the execution of the deed, *Fitzgerald v. Burk*, 2 Atk. 397; and that, as stated in the text, though notice be not charged in the bill. Where in the plea the purchaser omitted to deny notice, and the plaintiff replied to it instead of setting it down for argument, it was held, that if the defendant had proved what he had pleaded, the bill must have been dismissed with costs. *Eyre v. Dolphin*, 2 Ball & Bea. 302. *Harris v. Ingledew*, 3 P. Wms. 91. So, if in an answer notice be not denied, the plaintiff may except; but if he does not, and the defendant proves what he has stated in his answer, that, it seems, will be sufficient. 2 Ball & Bea. 303. But if a purchaser *bonâ fide* for valuable consideration without notice forbears to plead it, and it is afterwards fully proved that he is such a purchaser, it would be too much to deprive him of the effect of his plea, merely because he has not pleaded it. *Rancliffe v. Parkyns*, 6 Dow P. C. 230.

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Plea of purchase without notice,

not lost by omission to plead it.

As to a plea of purchase for valuable consideration without notice, see the latter end of the note in vol. ii. p. 653.

notwithstanding the objection that it ought to be in the plea (c), since all the defendant has to do, is to prove his plea; for he is not to prove a negative, *vis.* that he had no notice. However it seems best to deny notice, both in plea and answer.

and that positively not evasively;

Notice (d), if charged, must be positively denied in the answer; for, if it be only evasively denied, the court will decree a redemption on payment of the money only which was originally lent.

and sufficient if denied at time of purchase.

But, in general, in a plea (e) of a purchase, it is sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before; for, notice before, is notice at the time of the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury (v).

Notice before execution of conveyance, binding, though money paid.

If a purchaser has notice (f) before the execution of the conveyance, it will bind him, although he had no notice before he had paid his money; for it is all but one transaction (w).

Facts, &c. must be denied as well as notice.

It is a rule of the Court of Chancery (g), where the plaintiff charges not only notice in general, but also special facts and circumstances, *that they* must be denied, as well as notice in general,

(e) Sel. Ch. Ca. 51.

(f) *Wigg v. Wigg*, 1 Atk. 582.

(d) *Cason v. Round*, Pre. Ch. 226.
2 Vent. 361. 2 Ves. 450. 2 Ch. Ca.
73. [supra, 527, 8, et vide 2 Eq. Ca.
Abr. 682, (D), n. (b).—Ed.]

[See *Hill v. Bickerdike*, 12th May,
1801, Exch.—Ed.]

(g) *Scnhouse v. Earle*, 2 Ves. 450.
[vide etiam, 3 Atk. 815. Ante, 214.

(e) *Johnes v. Thomas*, 3 P. Wms.
243. Vide infra, *Kelsal v. Bennet*.

Mitford's Pl. 216.—Ed.]

(V) This general rule, however, must be received with due attention to what is said in a former page. See ante, p. 535, in the text.

Notice, before what time it must be given.

(W) So, we have already seen, that notice before the actual payment of all the money, although the conveyance be executed and the money secured to be paid by mortgage, bond, or otherwise, will be equivalent to notice before the contract. *Tourville v. Nash*, 3 P. Wms. 307. *Storey v. Lord Windsor*, 2 Atk. 650. *Moore v. Mayhow*, 1 Ch. Ca. 34. 2 Freem. 175, pl. 235. *Jones v. Stanley*, 2 Eq. Ca. Abr. 685, pl. 9.

If notice (h) be denied by the answer, and proved by one witness only, this is not sufficient foundation for a decree, and the bill must be dismissed (x). Notice denied, one witness not enough to prove it.

But this rule (i) admits of several distinctions, as, although, where the defendant's answer is a *clear* denial of a fact, which is proved only by one witness, the court will not decree against the answer; yet, where it is not a *positive* denial of the *same* fact, but admits of a difference (as, where it is only a denial with respect to the defendant himself, and *admits the fact as to another*, which will equally affect the defendant) the court, on the evidence of one undoubted witness, will decree against the answer. Thus, where one *only* denies personal notice, which is a negative pregnant, that still there *may be notice to his agent*, which is a fact equally material, the answer will not be good. Exceptions to this rule.

Notice to agent binding (v).

(h) 1 Ves. 66. *Kingdome v. Beakes*, Pre. Ch. 19.

(i) *Ibid.*

(X) This is an old rule. So long ago as the reign of Charles the Second it was held, that if the plaintiff bring an original bill, setting forth a parol agreement, which the defendant denies in his answer, one witness will not convict him. *Wakelin v. Wakhat*, 2 Ch. Ca. 8. So in 1683, in the case of *Alan v. Jourdan*, 1 Vern. 161, the plaintiff was denied a decree, because he brought but one witness against the defendant's answer, and the same was held good law by Lord Keeper Somers, in *Bath v. Montague*, 3 Ch. Ca. 123, and recognized by Lord Loughborough, in *Mortimer v. Orchard*, 2 Ves. jun. 244. In like manner Lord Northington, in *Howarth v. Deem*, 1 Eden, 351; Lord Alvanley, in *Cranstown v. Johnston*, 3 Ves. 170; Lord Eldon, in *Evans v. Bicknell*, 6 Ves. 191; Lord Redesdale, in *Biddulph v. St. John*, 2 Sch. & Lef. 532; and Lord Manners, in *Dawson v. Massey*, 1 Ball & Bea. 234, severally stated the rule to be, that if a defendant positively, plainly, and precisely denies an assertion in the bill, and one witness only proves it as positively, clearly, and precisely as it is denied, no decree for relief can be made, unless the circumstances of the case so preponderate, that greater credit, upon the testimonies of both sides being fairly balanced, must be given to the depositions of the witness than to the answer of the defendant, laying aside all recollection that the oath of one of the parties is that of an interested person. Vide etiam S. L. *East India Company v. Donald*, 9 Ves. 275. S. C. 1 Smith, 213. *Cooke v. Clayworth*, 18 Ves. 12, and *Savage v. Brooksopp*, ib. 335.

Rule in text confirmed by abundant authority.

(Y) S. L. *Le Neve v. Le Neve*, 3 Atk. 649. S. C. 2 Ves. 64. Amb. 436. 2 Bro. P. C. 73. *Blenharne v. Jennings*, S. C. 2 Vern. 609. 10 Mod. 492. 1 Ib. 244. 2 Ib. 278. *Coot v. Mummon*, 2 Bro. P. C. 596. 5 Ib. 355. 2 Ball & Bea. 304. Et vide vol. ii. p. 586, in *notis*. In a late case, a purchaser having employed the vendor's agent, who had notice of an incumbrance, was charged

Notice to agent binds principal, though latter an infant.

Belief not enough against a positive averment.

So, if the answer (*k*) be not *ad idem*, as if the charge be positive, and the answer only *to belief*, that not being suffi-

(*k*) *Arnot v. Biscoe*, 1 Ves. 95. 97. Sed quære.

[555 *]

But notice to agent must be in same transaction

Same as to purchaser himself.

with notice, notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin v. Steers*, 3 Meriv. 210. If the rule that notice to an agent is notice to the principal were otherwise, great inconvenience would ensue, and the old doctrine of notice would be in imminent danger; for, as observed by Lord Talbot, in *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685, pl. 11, n. a man, who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him, who had notice of a former title, which would be a manifest cheat. So in *Sheldon v. Cox*, 2 Eden, 228. S. C. Amb. 626, Lord Northington said it was a fixed and settled principle, that notice to an agent was notice to a principal. If it were held otherwise it would cause great inconvenience, and notice would be avoided in every case by employing agents. Notice therefore to the agent is clearly notice to the principal. But the agent cannot stand in the place of the principal until the relation of principal and agent is constituted; and as to all the information which he has previously acquired, the principal is a mere stranger. Consequently, to affect a principal with notice through the means of his agent, the notice must be in the same transaction, and while the relation of principal and agent subsists. Fitzg. 297. Barn. 220. Fourth resolution in *Worsley v. Scarboro'*, 3 Atk. 392. *Hiern v. Mill*, 13 Ves. 121. *Hamilton v. Royse*, 2 Sch. & Lef. 315. *Mountford v. Scott*, 3 Madd. Rep. 54. S. C. 1 Turn. 278. Et infra, vol. ii. p. 586. But notice will not be presumed merely from the circumstance of title-deeds having been laid before a counsel or attorney, or from any thing that could not be supposed to make an impression on the memory. *Ashley v. Baillie*, 2 Ves. 370.

The same rule that notice to be binding must be in the same transaction, applies to the purchaser himself as well as to an agent or attorney. Upon the point whether the purchaser should be deemed to have had notice of judgments, Lord Redesdale in one case made this distinction:—If a man purchases an estate under a deed, which happens also to relate to other lands not comprised in that purchase, and after purchases the other lands to which an apparent title is made independant of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase. But if a man agrees to purchase under limitations in a deed, which make it necessary upon that transaction for him to look into that deed, and the deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments, for he has a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it affecting his purchase. *Hamilton v. Royse*, 2 Sch. & Lef. 315, cited also vol. ii. p. 567, *in notis quod vide*.

cient to contradict what is *positively* sworn, the rule does not apply (z).

And (l), where there are a great many concurring circumstances that strengthen and support the deposition of the witness, such case does not come within the before-mentioned rule; for the oath of a man, with *circumstances* corroborating it, is better than that of a man whose testimony is not so supported.

Circumstances may be shewn to strengthen testimony of witness.

And if (m), upon the whole, the evidence is not sufficiently clear, whereupon to make a decree, it may be sent to law to be tried upon an issue, in which the circumstances may be investigated by the jury. But where the defendant in express terms negatives the allegation of the bill, and the evidence is *only* one person affirming what has been so negatived, and there are no corroborating circumstances, then the court will neither make a decree, nor send it to a trial at law (A).

Case may be sent to a jury; [556] but plaintiff's witness must give way to defendant's denial.

(l) *Janson v. Rany*, 2 Atk. 141. *Pember v. Mathers*, Bro. C. C. 52.
Walton v. Hobbs, *ibid.* 19. [S. C. 2 Dick. 550. nomine *Pemby v.*
 (m) *Arnot v. Biscoe*, 1 Ves. 97. *Mathew.—Ed.*]

(Z) As to the learned author's quære in note (k), the Master of the Rolls in a late case remarked, that it was said with truth, that where the answer is not as positive as the testimony of the witness, the testimony of the witness shall prevail against the answer, or supposing the answer positive, yet if the testimony of the witness be confirmed by circumstances, in that case also the testimony of the witness so supported and confirmed, shall prevail against the answer. *Piling v. Armitage*, 12 Ves. 80.

Author's quære over-ruled.

(A) So, in the case of the *East India Company v. Donald*, 9 Ves. 283. S. C. 1 Smith's Rep. 213, the rule of equity was admitted to be, that if there is nothing more than the positive unqualified assertion of one witness, and a positive denial by the defendant, the plaintiff shall not have a decree. But the Chancellor allowed that there might be an exception to that rule upon circumstances giving greater credit to the witness, and said, that if the defendant desired it, he would send the cause to a jury, with liberty to examine both him and the witness. Numerous other cases confirm the same doctrine, to which, in a work of this nature, it is merely necessary to refer. See, in addition to the cases already cited, *Ibbotson v. Rhodes*, 2 Vern. 554. *Anon.* 3 Atk. 270. *Only v. Walker*, *ib.* 407. *Le Neve v. Le Neve*, *ib.* 649. *Glynn v. Bank of England*, 2 Ves. 42. *Jolland v. Stainbridge*, 3 *ibid.* 478. *Cooth v. Jackson*, 6 *ibid.* 40. *Kemys v. Procter*, 3 Ves. & Bea. 59. *Dawson v. Massey*, 1 Ball & Bea. 234. *Toole v. Medlicot*, *ib.* 403. *Morphett v. Jones*, 1 Swanst. 172. S. C. 1 Jno. Wils. 100. Et vide 1 Phillips on Evid. 151, 4th edit.

[556 *]
Reference to cases confirming doctrine in text.

Not necessary to state the particular consideration.

On pleading (*n*), that the defendant is an incumbrancer for a valuable consideration without notice, it is sufficient to allege, that the purchase of the prior incumbrance was made for a *valuable consideration*, without stating the particular sum (*B*).

(*n*) 1 Ch. Ca. 34.

Design of note.

(*B*) Notwithstanding the tedious prolixity into which this chapter has diverged, the subject of it is still deserving of further consideration, both as it regards a recapitulation of its leading features, and the allusion which it will be necessary to make to the subsequent determinations on the subject. To facilitate this consideration, it will be attempted to exhibit in a concise form the leading features of the doctrines of priority and tacking, and then conclude with a few brief observations on the subject of notice.

PRIORITY.
Inclosure act.

I. As to Priority :—Beginning with the most absolute and arbitrary rule—mortgages by demise under inclosure acts made by tenants for lives, husbands seised *jure uxoris*, and other persons having but partial interests in the premises, for the purpose of enabling such persons to defray the expences of the inclosure, are, by the authority of parliament, entitled to priority, over and beyond all other mortgages and incumbrances, whether they have notice of prior incumbrances or not. The terms, therefore, created by such mortgages confer a right to the possession, and enable the mortgagee and his assignee to maintain an action of ejectment against and in preference to all other persons. Consequently these terms ought to be regarded with more than ordinary attention in all subsequent mortgage transactions. But quære, if the term is entitled to this precedence when its purpose is satisfied, and it is assigned to attend the inheritance. The words of the General Inclosure Act are, that a mortgage for the inclosure expences shall not be *defeated*—when, then, the mortgage is discharged, and there is no longer any chance of its being defeated, can the term confer that precedence which while it was bearing fruits it certainly would? And here by the way *note*, that where a tenant for life, who was impeachable for waste, felled timber to raise the expences of the inclosure, instead of exercising his power of mortgaging, he was decreed to account to the owner of the next estate of inheritance, *Lee v. Alston*, 1 Ves. jun. 78; although according to Brown's report of this case, there were intermediate remainders that might have arisen. 1 Bro. C. C. 194. Et vide *Gower v. Eyre*, Coop. 156.

By possession of legal estate.

2d. The person who has the controul over the legal estate, whether in fee or for years, and whether such legal estate be attendant on another estate or in gross, and whether satisfied or not, so as to be able to establish a title at law to the possession, or to protect himself in the possession, will be entitled to priority over all other persons, provided he have not notice of their incumbrances at the time of his obtaining a lien or estate in the land. Where the legal estate has not been acquired in, the first mortgagee has the best right to call for it. If it consist of a term attendant on the inheritance, notice to

the trustee will make his assignment in favor of a second incumbrancer a breach of trust, but no more, see ante, 475.

3d. As to the priority of incumbrances, equity creates no new title, but merely refuses to take away the protection which the legal estate affords to the person holding it, by enabling him at any time to take possession of the estate in an ejectment at law. Among mortgagees, where none has the legal estate, the rule in equity is, *qui prior est tempore potior est jure*, 2 P. Wms. 491. 1 Bro. C. C. 63; and therefore the buying a first mortgage, when the legal estate is in a third person, will be of no avail. *Clark v. Abbot*, Barn. C. C. 457. *Morrett v. Paske*, 2 Atk. 52. *Matthews v. Cartwright*, 2 ibid. 347. *Pomfret v. Windsor*, 2 Ves. 486. *Wortley v. Birkhead*, 2 ibid. 571. 3 Atk. 809. *Belcher v. Renforth*, 6 Bro. P. C. 28. *Robinson v. Davison*, 1 Bro. C. C. 63. *Willoughby v. Willoughby*, 1 T. R. 763. So also a fourth mortgagee gains no priority by purchase of the second mortgage, ante, 447. Where, however, the steward of a manor mortgaged his estate four times, but entered the admittance of the third mortgage in a wrong book, contrary to the custom of the manor, priority was decreed in favor of the fourth mortgagee, on the ground that he had no notice of the third, it being entered in a wrong book. *Welman v. Warren*, 2 Eq. Ca. Abr. 595, pl. 9. S. C. infra, vol. ii. 563, in *notis*. No equitable priority.

4th. The question of priority between incumbrances, if the legal estate has not been got in, depends on the better right to call for it; and the prior incumbrancer, if he has that right, is in equity in the same state as if he had an actual assignment. *Knott, Ex parte*, 11 Ves. 618. Et vide ante, 449, n. (S). This doctrine, however, must now be considered as over-ruled, see *Frere v. Moore*, ante, 451. The only protection is an actual assignment; a covenant to assign even, or an express trust fastened on the legal estate, in the hands of the old trustee, will not be sufficient. Ibid. Except when legal estate outstanding.

5th. Nothing but a mere voluntary and unjustifiable concurrence, on the part of the mortgagee, to the mortgagor's retaining the title-deeds, will be deemed a reason for postponing such mortgagee to subsequent incumbrances. *Plumb v. Fluit*, 2 Anstr. 432. 1 Fonb. 167. *Barnett v. Weston*, 12 Ves. 130. *Harper v. Faulder*, 4 Madd. 129. Ante, 54, 57, and 473. But though courts of equity will not on such ground postpone the first mortgagee, yet it seems that they will not take from the second mortgagee the title-deeds, unless the first mortgagee will undertake to pay him his money. *Head v. Egerton*, 3 P. Wms. 279. Ante, 472. Infra, vol. ii. 590. 1051. Postponement by permitting mortgagor to retain deeds.

6th. Standing by, and wilfully permitting a mortgage transaction to proceed without disclosing a prior incumbrance (if any), will postpone the party so tacitly acquiescing in the subsequent incumbrance, and will entitle the other party to a priority. *Barnett v. Wills*, Pre. Ch. 131. Et vide ante, 437, as to witnesses. So, an absolute denial of a prior incumbrance, if informed that other sums are about to be lent, will postpone the person so denying his debt and security, and give a preference to the other party, ante, 445, 6; et vide ante, 443, 446, as to where a person makes a false representation through mistake. Or standing by and encouraging subsequent mortgage.

7th. The

Second mortgagee may obtain what priority.

7th. The Court of Chancery will give a person who has obtained a mortgage of the equity of redemption this chance, that he may get in the legal estate if he can, and if he does get it in, the legal estate being united to his equity of redemption, he will have a priority to all the mesne mortgages, *Barnet v. Weston*, 12 Ves. 130; and that notwithstanding the mesne mortgages are duly registered, *infra*, vol. ii. 627.

Priority by equitable mortgage.

8th. An equitable mortgage by possession of the title-deeds, confers, on the person holding the deeds, a priority to other creditors. So does a letter to a specific creditor agreeing to make him a mortgage. *Infra*, 558, 2. 4. et vide vol. ii. 1049.

Acceleration.

9th. As connected with the subject in hand, it may not be amiss to observe, that it appears to have been thought, that if there are two mortgagees, and the first in point of charge buys in the inheritance, he will thereby let in the other on the estate discharged of the prior mortgage. 3 Pres. Con. 572. The rule deducible from a recent case is, that if a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second. *Parry v. Wright*, cited *infra*, vol. ii. pages 575a and 1089.

Priority by exception in covenant against incumbrances.

10th. In a case where one seised in fee, subject to several equitable incumbrances, conveyed the legal estate by way of mortgage and covenanted against incumbrances, except some of the equitable incumbrances, which were later in date than others; it was held, that the mortgagee was a trustee for the excepted creditors only, who had by that means acquired a preference to the equitable claims of their companions. *Ingram v. Pelham*, Amb. 153.

TACKING may be of one mortgage to another;

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II. As to Tacking:—1st. A puisne mortgagee may tack his incumbrance to a prior satisfied mortgage of the legal estate, and thereby obtain a preference to the mesne mortgage, judgments, or other incumbrance, of which he had no notice at or before the execution of his mortgage as distinguished from notice, at or before the time of his completing the purchase of such satisfied mortgage; notice of the eigne mortgage at the latter period not being of any avail, see *infra*, vol. ii. 596, 7.

if first mortgage forfeited.

2d. There cannot be any tacking of one mortgage to another, unless the prior mortgage be forfeited, see *ante*, p. 523.

Of tacking mortgage to eigne incumbrance.

3d. A puisne mortgagee may tack his mortgage to the eigne incumbrance, whether the incumbrance be a mortgage or a judgment, *ante*, 452, 3, 4. And that, whether it be of part only, or of the whole estate comprised in the puisne incumbrance, (*ante*, 476, 7, 8) provided the eigne incumbrance confer a title to the legal estate. But a second mortgagee or assignee of the equity of redemption, will not be compelled to redeem both the mortgage and judgment where the first mortgagee buys in a subsequent judgment, without the consent of the mortgagor, *ante*, 527. And it is very questionable, whether on a bill to foreclose the mortgagor himself would be compelled to pay more than the principal, interest, and costs on the first mortgage, though it is possible, that on a bill to redeem he may be decreed to pay both the mortgage and the judgment too.

4th. So, a mortgagee may tack to his security further sums lent, if he have no notice of mesne incumbrances at the time of making such further advances, ante, 524. And if he take a judgment for such further advances it will be the same. But if all the mortgagees are equitable incumbrancers, tacking is out of the question, whether with or without notice, ante, p. 451, n. Hence a second mortgagee can never tack subsequent advances to his mortgage as against a mesne third incumbrancer, if the first mortgage be in fee, but this is certainly a flaw in the analogy which courts of equity profess to observe between legal and equitable estates. Et vide ante, p. 524. *Further advances to mortgage.*

It can be of little advantage for an annuitant to buy in a first mortgage, as he has nothing to tack to—the second mortgagee may redeem the first mortgage without redeeming the annuity. The annuity is a purchase, not a security. In a mortgage the principal debt still continues until the equity of redemption be foreclosed; but upon the purchase of an annuity the principal money paid for the annuity is gone for ever, and consequently if a re-purchase be made under a clause for that purpose, the money paid upon that occasion is not in discharge of a debt, but as the consideration for a new purchase. A mortgage, moreover, is the personal estate of the mortgagee, though it be made to him in fee; but an annuity is considered as the real estate of the grantee, if it have a freehold quality. 2 Atk. 497. 1 Ves. 403. 2 Sand. U. & T. 313, 4th edit. *Annuitant can not tack.*

5th. A first mortgagee may tack subsequent judgments to his mortgage, if he have no notice of the intervening incumbrances, ante, 525. *Sheppard v. Titley*, 2 Atk. 350. *Anon.* 2 Ves. 662. *Of tacking judgments to mortgage.*

6th. A mortgagee may tack his subsequent bond to his mortgage, as against the mortgagor's heir (if bound) or beneficial devisee, but not as against creditors, trustees for creditors, or other persons entitled for a valuable consideration, either under the mortgagor, or under his heir, executor, or devisee. *Coleman v. Winch*, 1 P. Wms. 775. *Powis v. Corbet*, 3 Atk. 556. *Troughton v. Troughton*, 1 Ves. 87. *Heames v. Bance*, 3 Atk. 630. *Anon.* 3 Salk. 84, (where the position is mis-stated by Sir W. D. Evans in a note there.) *Lothian v. Hassell*, 3 Bro. C. C. 162. *Bayley v. Robinson*, Pre. Ch. 89. *Ibid.* 198, and 12 Mod. 559. *Eccles v. Thawell*, *nomine Anon.* 2 Vern. 177. Et vide ante, pages 348, 351, and 352, notes (G), (K), and (L). A distinction has been taken in reference to tacking bonds, between a bill to redeem and a bill to foreclose, *infra*, vol. ii. 1096. In the former case, it is said, the mortgagor shall not redeem without paying the subsequent bond debt as well as the money secured on mortgage; and, in the latter, that he will be liable to pay the mortgage debt only, for that the bond was originally no lien on the land, 1 Ch. Ca. 164. 2 *Ibid.* 194. 1 Ch. Rep. 247. 1 Vern. 245. Pre. Ch. 407. *Gilb. Eq. Ca.* 96. But the rule, as stated, seems to be correct without the distinction, *infra*, vol. ii. 1019. It is, however, now clearly settled, that the right to attach a subsequent bond debt to a mortgage cannot be made available against an assignee of the equity of redemption. *Adams v. Claxton*, 6 Ves. 229. *Troughton v. Troughton*, 1 *ibid.* 86. *Jackson v. Langford*, *nomine Anon.* 2 Ves. 662, and *Heames v. Bance*, *ubi supra*, and note. If a person indebted by mortgage and bond pay money to his creditor generally, the creditor may apply it in discharge either of the mortgage or the bond. *Wilkinson v. Sterne*, 9 Mod. 437. *Infra*, vol. ii. 944. *Of tacking bond to mortgage.* *Voluntary payment may be applied to bond or mortgage.)* 7th. But

But not simple contract debts to mortgage.

7th. But a mortgagee will not be allowed to tack simple contract debts to his mortgage, although the mortgagor may have entered into a parol agreement that he shall be at liberty so to do. See ante, p. 524, n. (S).

Nor mortgage to judgments.

8th. A creditor by judgment, statute, or recognizance, buying in the first mortgage, cannot tack the judgment, statute, or recognizance, to the mortgage, because he did not lend his money on the credit of the land; nor can he be called a purchaser, having no present right in, but merely a lien on the land. *Wortley v. Birkhead*, 2 Ves. 571, ante, p. 527. A mere judgment creditor, though he deals originally for a lien, does not get an estate in the land, he has neither *jus in re*, nor *jus ad rem*. But if there be once a creditor by mortgage, and he afterwards advances money upon a judgment, the court will intend that he makes that advance, meaning to take a security upon the land for both, *and he may tack*; but, if he remains a mere judgment creditor, the court says he does not deal upon the faith of the land in this sense, that he does not contract for an interest in the land, and then he cannot tack.—*Knott, Ex parte*, 11 Ves. 617.

Nor mortgage to bond.

9th. So, a bond creditor gains no preference by buying in the first mortgage, for he cannot tack his bond to the mortgage against subsequent incumbrancers.

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Nor judgment to mortgage of copyholds.

10th. A mortgagee of copyholds cannot tack a judgment to his mortgage, because judgments do not affect lands of that tenure. *Cannon v. Pack*, 6 Vin. Abr. 222, pl. 6.

Tacking in Ireland.

11th. A mortgagee in Ireland is prevented, by the operation of the registry act (6 Anne, c. 2. Irish Stat.) from tacking, so as to gain a priority against mesne registered incumbrances. See *Latouch v. Dunsany*, 1 Sch. & Lef. 154, and post, vol. ii. 630, n.

To tack, both incumbrances must be held in same right.

12th. The right of the first mortgagee who has the legal estate, to tack as against mesne mortgagees, does not cover a mortgage of the equity of redemption coming to him as executor. For it is just the same as if the estate were in two different persons, being in the same person in different capacities. The legal estate is in him in his own right, and the equitable interest in him in right of another. The legal and equitable estate therefore cannot unite to the effect of squeezing out (as it is termed) *mesne* mortgagees, per Sir Wm. Grant, in *Barnet v. Weston*, 12 Ves. 135. But as no authority was produced on either side, Sir William Grant wished to see whether any decision had taken place on the question, and whether it had been discussed. If he found any thing upon it he would mention it. But the cause was not mentioned again.

No tacking against assignees of bankrupt, when.

13th. A mortgagee will not be permitted, as against the assignees of a bankrupt, to tack a mortgage made subsequently to the act of bankruptcy, though without notice and previous to the commission; *not*, though he have the legal estate. *Herbert, Ex parte*, 13 Ves. 183. This case was decided a few months after the passing of Sir Samuel Romilly's act, and without any reference to that statute. It is denied to be law by Mr. Sugden Ven. & Pur. 647, 5th ed.

but it was adopted by Lord Redesdale in *Latouche v. Dunsany*, 1 Sch. & Lef. 182. Its authority will be more fully investigated in a future note, post, vol. ii. 592, *in notis*, to which reference is made. And it is observable here, that in another case, *Baker v. Harris*, 16 Ves. 397, (which also has been denied to be law, see n. (W), p. 533, ante), where there were first and second mortgagees, and the mortgagor was a bankrupt, the first mortgagee was held entitled to tack to his mortgage a subsequent judgment docketed, though no execution had issued at the time of the bankruptcy.

III. On the subject of Notice, (which forms the concluding subject of this chapter, and occupies the whole of the succeeding one); it is merely necessary to remark in this place, that neither an act of bankruptcy, 2 Vern. 592. 2 Ch. Ca. 13. For. 65. 4 Burr. 2425. 11 Ves. 609. post, vol. ii. 590, nor a commission of bankruptcy, 2 Vern. 156-7. East, 161, sed vide ante, 552, n. (T); nor a decree of the Court of Chancery, Toth. 45. 1 Vern. 57. 122; nor the docketing of a judgment, 2 Ch. Ca. 47. 170. Amb. 154. 1 *ibid.* 37. 2 Freem. 176, will of itself be notice to a purchaser or mortgagee; nor will the enrolment of a bargain and sale, or the registration of a deed in a register county, be of itself notice to a subsequent mortgagee of the prior incumbrance, *Morecock v. Dickins*, Amb. 678. *Cheval v. Nickolls*, 1 Str. 664. See on this subject, *Bushell v. Bushell*, 1 Sch. & Lef. 92. 103, and see *ibid.* 137 and 157, as also post, vol. ii. 616, *et seq.* But note, a public act of parliament, 2 Ves. 48; and a *lis pendens*, ante, 542, will be notice to all the world. Lastly, it may not be amiss to mention, that actual notice of a bargain and sale not enrolled, 3 Atk. 651, 2, or of a deed not registered, *Bushell v. Bushell*, 1 Sch. & Lef. 102. *Worsley v. De Mattos*, 1 Burr. 474, et vide 2 Sch. & Lef. 532; or of a judgment not docketed, *Davis v. Strathmore*, 16 Ves. 419, will respectively affect a purchaser; and be binding on him in equity in the same manner as if the bargain and sale had been enrolled, the deed registered, or the judgment docketed. But a mortgagee need not give notice of his mortgage to a purchaser of the estate. *Osborne v. Lea*, 9 Mod. 97.

NOTICE.

END OF THE FIRST VOLUME.

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